

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

HOWARD ACKERMAN,)	CASE NO: 2:11-CV-883-GMN-PAL
)	
Plaintiff,)	CIVIL
)	
vs.)	Las Vegas, Nevada
)	
STATE OF NEVADA)	Friday, February 10, 2012
DEPARTMENT OF CORRECTIONS,)	
ET AL.,)	(10:21 a.m. to 1:16 p.m.)
)	
Defendants.)	

MOTION HEARING

BEFORE THE HONORABLE GLORIA M. NAVARRO,
UNITED STATES DISTRICT JUDGE

Appearances: See next page

Court Recorder: Araceli Bareng

Courtroom Administrator: Melissa Jaime

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APPEARANCES FOR:

Plaintiff:

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Defendants:

WILLIAM J. GEDDES, ESQ.
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State of Nevada
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

Las Vegas, Nevada; Friday, February 10, 2012; 10:21 a.m.

Call to Order

THE COURT: Thank you. You may be seated.

MR. SPEAKER: Thank you.

THE CLERK: *Howard Ackerman versus Department of Corrections*, 11 Civil 883 GMN PAL. This is the time set for a status conference.

Counsel, please note your appearances.

MR. HAFTER: Good morning, your Honor. Jacob Hafter and Michael Naethe for Plaintiff, Howard Ackerman.

THE COURT: Good morning, Mr. Hafter. And I don't think I've met Mr. Naethe yet. Good morning, Mr. Naethe.

MR. NAETHE: Good morning, your Honor.

MR. GEDDES: Good morning, your Honor. Will Geddes for the NDOC Defendants and I'm joined here by my client, Dawn Rosenberg.

THE COURT: Good morning, Ms. Rosenberg. Thank you for joining us. And good morning again, Mr. Geddes.

MR. GEDDES: Thank you.

THE COURT: Let me try to make some sense of this because there's quite a bit that's been filed back and forth, and I tried to organize it somewhat and I ended up having to color code it so that I could actually keep track of it.

So go ahead and keep your indexes. I'll kind of go through my notes and tell you which motions I think are before

1 me that I can rule on, which ones we'll need to wait for, and
2 which ones I'll refer to Judge Leen, and tell me if I leave
3 anything out.

4 Okay. Starting off, obviously this is a continuation
5 of the Plaintiff's first TRO motion which is on the docket as
6 Number 4, and I'm going to refer to these numbers by their
7 docket, the motions and the responses and such by the docket
8 number. It just makes it easier for my Clerk when she does the
9 minutes to keep track of what's what as well.

10 So, you know go ahead and copy those down if you want
11 to, but if you don't want to, you could just ignore those. But
12 -- so the Motion TRO Number 4 was heard back in June and that's
13 when you-all entered into an agreement to wait six months and
14 see if there couldn't be a resolution.

15 And then we came back and continued it -- we lifted
16 the stay at that point, continued it for another 30 days. I
17 think that was in January and we had a hearing then.

18 Then we set the status conference for a week or so
19 ago, and there were still many different things being filed
20 back and forth so we put it off until today to see if we could
21 get as many late motions as possible that we could rule on
22 today.

23 And so Motion Number 4, which is the initial motion
24 for the TRO, essentially is pretty moot at this point because
25 it really only addressed the initial unimplemented, initial

1 common fare menu, and there's been changes to that now.

2 So I'm going to go ahead and deny without prejudice
3 the motion for the TRO inasmuch as it only applies really to
4 the initial implementation of the common fare menu that was
5 never actually implemented.

6 Now, since then we've had quite a few other motions
7 filed, and one of the -- my law Clerk called it, "here's a fun
8 fact." One of the fun facts is that since the January 3rd
9 hearing, the parties have filed over 1,000 pages of documents.
10 Thank you very much. Okay.

11 So, going now we've got the emergency Motion Number
12 31, which was actually three motions in one. First of all
13 there's a motion for preliminary injunction; there's also a
14 motion for class -- rather for reconsideration of class
15 certification because that was denied without prejudice; and
16 then there's also a motion for an order to show cause or for an
17 evidentiary hearing as to whether the status quo was maintained
18 or not when Mr. Ackerman was moved to Lovelock, and whether or
19 not there's a kosher menu being offered there.

20 So those three motions are actually -- are contained
21 in Motion 31. And I would just ask in the future if you could
22 file them separately. It's just a lot easier for us to keep
23 track of them because we use a computer system and it links
24 things by numbers, and so it just causes a lot more trouble if
25 you file numerous motions in one. But I think we've got it

1 straightened out.

2 There is also an amended complaint that was filed,
3 and that was Number 29. And in response to that amended
4 complaint, the Defendants did file a motion to dismiss which is
5 Number 33.

6 And inasmuch as the motion to dismiss raised quite a
7 few issues and then the response was filed on February 8th, if
8 I was going to go ahead and grant the motion to dismiss today,
9 I would go ahead and do so. And I'm sure that the Defendant
10 would waive their right to file the reply.

11 But having reviewed the response to the motion to
12 dismiss, I do think that there is some issues there that -- or
13 some arguments that were raised that require me to look a
14 little bit further into this. And so I do appreciate if the
15 Defendants go ahead and reply. I think the deadline is
16 February 18th. You can let me know if that's doable or not.

17 **MR. GEDDES:** Thank you, your Honor, we will do that.

18 **THE COURT:** Is -- would February 18th be enough time
19 for you?

20 **MR. GEDDES:** Yes, your Honor.

21 **THE COURT:** Okay.

22 **MR. GEDDES:** Thank you.

23 **THE COURT:** Then I prefer to wait until after
24 February 18th to receive that reply --

25 **MR. GEDDES:** Thank you.

1 **THE COURT:** -- before I actually rule on the motion
2 to dismiss. So that was my intention is that I would rule on
3 the motion to dismiss today if I was going to be granting it,
4 but I'm not going to be granting it today. Rather I'd like to
5 hear from the Defendant.

6 So moving on then, there's also two other motions
7 that were filed that were referred to Judge Leen. There's
8 Number 40 which is a motion for order to show cause prohibiting
9 the Alif (phonetic) institution -- institute, sorry -- from
10 contacting Chaplain Friedman.

11 And then there's also Plaintiff's motion to strike
12 Chaplain Friedman's declaration.

13 And the responses to those are due February 24th. So
14 those aren't ripe and fully briefed yet.

15 I'm going to go ahead and refer to Judge Leen to
16 address those motions. So specifically, Judge Leen will
17 address the motion to show cause Number 40, and part of Number
18 52, which is the motion to strike the declaration that -- that
19 was actually kind of a two parter in that the motion applies to
20 both Number 40, the motion to show cause, and also to the
21 motion for PI.

22 So I will address part of that motion to strike, the
23 part of the motion that applies to today's preliminary
24 injunction hearing. And so it's part of Number 52 which is the
25 motion to strike, will be addressed by me as it relates to

1 Motion Number 31 which is the motion for PI.

2 The other part of Motion Number 52 which applies to
3 the motion to show cause Number 40, we'll allow Judge Leen to
4 go ahead and rule on that.

5 Now in this case, I have to say, because this is a
6 preliminary injunction hearing and because it's going to be
7 decided by the Court and not by a jury, there's a, you know, a
8 different -- a different way of looking at this particular
9 declaration.

10 First of all, I could just deny it without adequate
11 basis because we're not in the discovery stage. So some of the
12 issues that were raised as to whether or not there was a proper
13 disclosure or a timely disclosure doesn't really apply so much
14 in the sense that we haven't actually had a discovery
15 scheduling order, so there really isn't a deadline yet for the
16 disclosure of an expert. So a deadline hasn't been set, let
17 alone expired. So really that basis doesn't apply.

18 The issue of whether or not Chaplain Friedman is
19 experienced enough or whether he is certified to be providing
20 opinions that he's provided in the declaration, that's
21 something that I'm going to go ahead and consider. And so I am
22 going to deny that motion to strike because I am going to
23 consider the declaration of Chaplain Friedman, but I am going
24 to decide what weight to give it. And that's in light of the
25 objections that have been raised by the Plaintiff, so it really

1 is, in essence, it's not a matter of the admissibility of it.
2 I'm going to admit the declaration, but I am going to look at
3 it with a close eye as to whether or not how much weight should
4 be given to it.

5 So looking in more detail now for the group, I'll
6 call them the trio. The trio of Plaintiff's motions which is
7 Number 31. And that again is the motion for preliminary
8 injunction, motion for class certification, and motion for an
9 order to show cause and for an evidentiary hearing.

10 Starting off first, there was a motion to file a
11 surreply that was filed by the Defendants. That's Number 61,
12 and that was filed last night at 3:00 a.m.

13 And then Plaintiffs quickly got themselves together
14 and they filed a response this morning at 8:35 a.m. And I did
15 briefly get a chance to very quickly look at that, and -- but
16 my sense is that I think the most appropriate thing to do in
17 this regard so that we can go forward is I'm going to go ahead
18 and grant the motion to file the surreply. I'm going to
19 consider its contents.

20 First of all, the things that I look at is whether or
21 not the surreply is outside the scope of the reply. In other
22 words, if you're bringing up something completely new and
23 different, then I would not grant it.

24 But really it's a response, so it was brought up in
25 the Plaintiff's reply. So I think it is appropriate to go

1 ahead and allow the surreply to be filed.

2 And also there's nothing really redundant in there.
3 So I'm going to go ahead and allow it to be filed, but again,
4 I'm going to take -- let you-all give me some argument today,
5 so you can still address all the information that's provided in
6 that surreply. But I am going to be granting Number 61, the
7 motion to file the surreply.

8 So getting a little bit into the meat of this, some
9 of the questions that I have that I highlighted in blue here,
10 I've got a list of the Plaintiff's sources for kosher
11 authority, and that essentially begins with the Torah and the
12 first five books of the Bible, the Talmud, the Code of Jewish
13 Law, Judge Rule's (phonetic) order from 2005 in the Green
14 case. Also there's the declaration from Rabbi Grossman
15 (phonetic).

16 And looking through it, I don't see that the
17 Plaintiff necessarily specifies what does constitute formal
18 authority, and I know in the latest filing -- but you do refer
19 to the rabbinic counsel, but you also referred to the
20 California prison system and their certification of kosher that
21 is the -- at -- and I'm not sure exactly how to say, is at a
22 different standard than the standard that is used in Nevada.

23 But when you're referring to the standard, I'm not
24 sure if that's a legal standard or a religious standard, or
25 just a common law standard. So maybe when it's your turn to

1 speak if you could kind of address that a little bit to clarify
2 it for me, I would appreciate it if you can.

3 Let's see. There were -- one of the exhibits to
4 Defendant's response to the motion for preliminary injunction,
5 it was Docket Number 47-6, Exhibit D, is the common fare menus
6 kosher certification, which I'm presuming certifies that menu
7 as kosher. And I would appreciate if you could elucidate on
8 that a little bit and give me a better idea of how that exactly
9 works.

10 Let's see. We've got a -- the legal standard is
11 pretty clear, and I think both parties agree with the Winter
12 (phonetic) case. And that the four things that I'm looking at
13 is the likelihood of success on the merits, the likelihood of
14 irreparable harm in the absence of the preliminary relief, the
15 balance of the equities, and whether the injunction is in the
16 public interest.

17 However, there wasn't very much information provided
18 to me on the standard of proof, and so I want to make sure that
19 both parties agree here, because the Defendants are arguing
20 that the required showing -- or the clear showing is that the
21 evidence be extraordinary. Extraordinary evidence is what the
22 Defendant is stating.

23 And I think the only -- the only authority that was
24 provided for that was an unpublished decision by a Magistrate
25 Judge in California. So, the Plaintiff didn't touch on that

1 issue, and there's so many other issues that I, you know,
2 I'm -- I guess I'm surprised and -- that you were able to touch
3 on as many issues as you could in such a short period of time.

4 But if you do have a position as to whether or not
5 you agree that extraordinary evidence is required for the clear
6 showing, or whether there's some other different standard of
7 proof, you know, please let me know what your position is on
8 that.

9 Also the Plaintiff didn't really address the Walmart
10 case, and that's, you know -- well, actually I'm going to go --
11 we'll get to that eventually for the class certification.

12 But it's important to note that the Ninth Circuit has
13 held that there are serious questions going to the merits and
14 the hardship balance that tips sharply towards the Plaintiff,
15 and that can support an issuance of an injunction.

16 I have to tell you, at this point, I don't think that
17 the likelihood of success on the merits is clear. But there is
18 that other balancing test that we do, and in that sense, I
19 think maybe perhaps it is appropriate to at least look very
20 closely at granting that preliminary injunction. And I'll tell
21 you a little bit later what I'm thinking.

22 I really want to get an idea of whether or not the
23 Plaintiff had any objection to or any recommendation or request
24 for a preliminary injunction that was perhaps a little less
25 severe, a little less broad than what is currently being

1 requested.

2 And I think that dovetails probably into the class
3 action certification issue.

4 My understanding, and again, I'm going to give you a
5 chance to clarify, but my understanding is that this common
6 fare menu is not meant to apply only to the inmates that
7 declare themselves to, you know, require a kosher menu, but
8 rather it applies to every individuals that have special
9 dietary needs. Diabetics, high blood pressure. Just every
10 individuals. I'm not sure.

11 But if that is the case, then could there be an order
12 that would enjoin the implementation as to the kosher inmates
13 but not as to all the other inmates that have special dietary
14 needs, so that at least some of the cost savings can be
15 realized by the prison.

16 Because there is quite a bit of funding here that
17 could be saved, and that is definitely in the public's interest
18 to try to save as much money as possible and still comply with
19 the laws and the requirements.

20 So maybe there is some wiggle room. I don't know. I
21 think what I remember seeing is, and I don't remember which
22 party provided me the number or if it's even accurate, but
23 about a hundred or so inmates are actually currently included
24 in the kosher diet, which to me seems like that leaves a whole
25 lot of other individuals who have other dietary needs that

1 perhaps could still be served, and then the state could sill
2 save some money that way.

3 But you-all let me know if you think that's -- if I'm
4 -- I try really hard not to just come up with a resolution that
5 you-all didn't ask me to enter into. I try to streamline it,
6 but that just occurred to me, and I wanted to throw that out
7 there to see if that was something that maybe we could do
8 because I know this has gotten a little bit more adversarial
9 probably than it needs to be.

10 Now let's see. The other thing was looking at --
11 there are some issues with the, you know, the legal term
12 substantial burden. And I realize the Defense -- the
13 Defendant's position is that it's not a substantial burden
14 because it is kosher.

15 Well, okay, I understand that, but if it's not
16 kosher, I think there is case law out there that is pretty
17 clear that it would be a substantial burden to the inmate if
18 this diet is in fact not kosher.

19 And my understanding is that the issue is not whether
20 the individual items on the menu are kosher or whether the, you
21 know, the lunch and the breakfast taken as a whole is kosher,
22 but whether the preparation is going to be done in a kosher
23 manner, whether the facilities that are used have been
24 kosherized (phonetic), for lack of a better word. But whether
25 everything is done properly, how often it's going to be

1 checked, and so forth.

2 So that's my understanding. That it's not a matter
3 of whether or not the food itself is kosher, but -- or whether
4 the plan of having, you know, milk with fruit versus, you know,
5 sausage and milk even on the same thing, that whether or not
6 that is -- is being offered, that that's not the -- the foods
7 themselves are not the issue. It's the preparation area, and I
8 think we talked about last time about whether it's going to be
9 -- have a lock on it and in a separate location and things like
10 that.

11 But it seems like perhaps there could be a way to
12 allow the prison to implement the common fare program and --
13 but just limit it as to either Mr. Ackerman, since he's the
14 only Plaintiff at this point, or to all of a hundred or so
15 inmates that are declared kosher if they qualify for a class
16 action status and if they have to first exhaust their grievance
17 procedure, and whether or not they need to opt in or opt out.

18 That's something that if you want to mention to me
19 what your thoughts are on that, I'd like to hear those.

20 Okay, Rabbi Bronchtain. Is he here?

21 **MR. HAFTER:** Your Honor, he's not. We had a --

22 **THE COURT:** Okay. That's all right. I was just
23 going to sympathize with him for the position that he's been
24 placed in because it sounds like he's kind of getting the phone
25 calls and getting grief from all different positions, and it

1 doesn't appear this is a situation of his making, and so I was
2 going to thank him for all the assistance that he provided.

3 But -- to tell him that I appreciate it and I'm
4 empathetic, and I'm sorry that he's put in this position. But
5 if he's not here that's okay.

6 I understand that there -- okay. So Rabbi Bronchtain
7 at this point is now refusing to sign the contract to provide
8 the ongoing services with the Department of Corrections for
9 Nevada.

10 And that may or may not be his own choice or, you
11 know, he has other individuals that he has to respond to, and
12 his constituency for lack of a better word, congregation,
13 whatnot.

14 But the Defense is saying that perhaps there is
15 another Rabbi from California who likewise does certifications
16 for the prison systems in California who is available and is
17 willing, and would be able to contract with the department, and
18 come and fulfill both services.

19 So I know this is short notice, and you probably have
20 a lot of questions as I do, but -- so I'm wondering if the
21 Plaintiff still has a concern with this particular Rabbi, other
22 than the fact that obviously you've stated that the standard is
23 different in California than it is in Nevada. And again I'm
24 not sure if that's a legal standard or just a community
25 standard.

1 But the individual himself, I'd like to know whether
2 he would have any problem with him, his certification, his
3 authority, his ability and so forth, or if it's just a matter
4 of him being able to apply two different standards.

5 We tell that to the juries all the time when they
6 come in here. If they've served previously in state court, we
7 explain to them, well, sometimes we have -- the law applies
8 differently in federal court than state court. Can you set
9 that aside and apply a different standard?

10 So, let me know if you have any other concerns with
11 -- I'm just calling him the California Rabbi because I forgot
12 his name already, but you know who I'm talking about.

13 Okay. Let's see, what else do I want to ask here?
14 Oh, Moskowitz. That's what it was.

15 Oh, Ackerman's last non-kosher purchases as late as
16 March of 2011. I understand he's been making some non-kosher
17 purchases and the Plaintiffs are saying, well, he may not have
18 known that the purchases he were making were non-kosher. And
19 we don't know if he's even eating it or if he's providing it to
20 other individuals. Whether or not that's against the
21 regulations, you know, inmates do that and so forth.

22 And so Plaintiff is asking me not to give too much
23 weight to the fact that Mr. Ackerman has made these purchases.
24 So it sounds like you are not denying that he made these
25 purchases, but just rather how much weight I should give to

1 that. You're asking me to kind of not give it as much weight
2 as the Defendants are requesting.

3 Let's see. There was an argument that the Plaintiff
4 brought as to whether or not the Department of Corrections Greg
5 Cox had followed the proper procedure in implementing the
6 common fare menu, and whether or not that violated state law.
7 And the way that that regulation was implemented, whether or
8 not it needed to be approved or not. And it hasn't been
9 approved by the board or -- whether or not that particular
10 statute -- the Nevada statute, whether it does apply and
11 authorize Mr. Cox to go ahead and implement that menu
12 unilaterally or not.

13 And I think that that argument is a valid concern,
14 but it's not properly raised in a reply. And it probably would
15 be best to raise it in a motion to amend the complaint, because
16 my understanding is that what you would like to do is go ahead
17 and amend the complaint to include Mr. Cox, and then raise the
18 issue of whether or not that common fare menu was properly
19 authorized and put into effect.

20 Okay. Then the other part of Number 31 which is the
21 motion to reconsider the show cause, as to whether or not
22 Mr. Ackerman, who has been moved to Lovelock, whether or not
23 that was done in retaliatory fashion, whether there was --
24 well, I guess that I shouldn't say retaliatory fashion because
25 that's another cause of action, but whether or not there was a

1 violation of the Court's original order which was really -- my
2 original order of staying the case for six months was at the
3 request of the parties, because I remember that you-all stood
4 up and kind of conferred, and I gave you a little bit of time
5 to see if you could come to some kind of agreement.

6 And then you told me that what you had agreed on was
7 a six month stay where the status quo would remain the same,
8 and you would try to see if you could resolve something before
9 the implementation of the plan and see if there was some
10 resolution that could be reached.

11 So, my concern was that Mr. Ackerman was moved, and I
12 think that that concern has been alleviated by the
13 documentation provided in the Sealey (phonetic) declaration
14 that does pretty much document -- well, it's well documented
15 that -- and justified that the reason for his move is something
16 that was within the purview of the department to go ahead and
17 move Mr. Ackerman, if that is a concern, for his safety and the
18 safety of others. That's certainly something the department
19 can do.

20 I think the real issue here though is where he was
21 moved to and whether or not he was moved to a location that
22 does provide kosher meals or not. And I understand that
23 Mr. Ackerman did try early on to provide an affidavit saying,
24 now I'm in Lovelock and I'm not receiving kosher meals anymore.
25 And that's a valid concern if in fact he's not receiving kosher

1 meals.

2 The problem I have is that he failed to produce any
3 evidence or anything other than just his own declaration which
4 really only contained his opinion and if this Court issued an
5 injunction for every case where someone just files an affidavit
6 with their opinion, you know, we'd be doing injunctions every
7 day all day long. So, you know, the standard -- you all are
8 very familiar with what the standard is and we do need to have
9 more information than just his opinion that the food that he's
10 being provided at Lovelock is not kosher but if it's not, that
11 is a problem. If it is kosher, it's not a problem but if it's
12 not kosher and he was moved there, that's a problem.

13 Let's see. So as far as the part of Number 31, the
14 motion to reconsider -- or rather the motion to show cause, I'm
15 going to be denying that because there's not information at
16 this point to determine whether or not there was a -- well, the
17 Plaintiff hasn't met its burden to show me that there was a
18 failure to comply with the Court's order to provide the status
19 quo and that Mr. Ackerman was moved for the purposes of denying
20 him the kosher meals that he is fighting to retain.

21 Now, the other -- the third part of the motion to
22 reconsider -- or third part of Motion 31 is the motion to
23 reconsider certifying the class and many valid points are
24 brought by both parties. My concern is how this would look.
25 In essence, there does need to be an exhaustion of

1 administrative remedies or there does need to be a grievance
2 process, whether or not these individuals would be opting in or
3 opting out, whether or not they could be represented in this
4 group by Mr. Hafter, whether we would be having another --
5 would Mr. Hafter be a lead counsel? Would we have two co-lead
6 counsels? Would we have another counsel?

7 I mean, Defendant really brought up some really valid
8 points about all those individuals but I think even if there is
9 animosity among them, sometimes a common cause can bring people
10 together and that's not a reason to deny a motion to certify
11 class just because not everyone in the class gets along. I
12 mean, if they all have the same concerns and if they all agree
13 that they all qualify and opt in or don't opt out and frankly I
14 just didn't have enough time to look at which one of the two
15 methods we would use in this particular situation. That's
16 concerning to me.

17 As far as the preliminary injunction, I'm leaning
18 towards denying the motion in essence as it applies to all
19 other individuals that -- whose needs would be met by this
20 diet, the people who have the other dietary concerns, medical
21 concerns, whatever they may be, if their concerns can be met by
22 this diet. My question really is would the preliminary
23 injunction only apply as to Mr. Ackerman or to all the kosher
24 inmates and of course the questioned to me, well, so how do you
25 decide who is and who isn't? The same way you've always

1 decided who is and who isn't a kosher inmate. Whatever the
2 process is that you use now can still consistently be used to
3 determine whether someone does qualify or doesn't qualify,
4 whether -- I normally -- I am familiar with how you determine
5 now whether someone is or isn't, whether they've converted,
6 whether it's a new prisoner who just came in but whatever that
7 process is could be used.

8 So this was essentially Plaintiff's motion. So I'm
9 going to go ahead and allow Plaintiffs to argue first and we'll
10 hear from the Defendant and then I'll let Plaintiff have the
11 last word. So Mr. Hafter. Now, I'm going to be quiet and you
12 talk and I'll take notes.

13 **MR. HAFTER:** Thank you, your Honor, a lot of
14 information there. First and foremost as a preliminary matter,
15 I want to say that we have a lot of the same questions you have
16 because personally -- and I'm going to take a step out here --
17 I'm shocked at the behavior of Defendants in the way that
18 they've managed the litigation in this case. To file, for
19 example, issue -- a whole support from a brand new rabbi
20 addressing the common fare menu at 3:00 o'clock in the morning
21 before we have this hearing is not the spirit of what I think
22 this Court intended by giving us 30 days' notice and, you know,
23 we didn't find out anything substantive about the common fare
24 menu and the kashruth thereof until Tuesday or Monday night
25 when they dumped 200-and-something pages on us in an opposition

1 to the motion for preliminary injunction.

2 And so of course we don't have experts or anything
3 about this because how are we supposed to get that? And
4 moreover, many of the accusations about Mr. Ackerman, because
5 he's incarcerated and I can't just pick up the phone and talk
6 to him or I can't have him come to my office and sign an
7 affidavit, I can't get you evidence on -- in this manner and I
8 hope that the Court is sympathetic of those issues. That being
9 said, let me address --

10 **THE COURT:** Well, if he has you on his list as his
11 attorney, you should be able to call him and coordinate that so
12 that he can call you back.

13 **MR. HAFTER:** He can call us but we have a very
14 difficult time calling him.

15 **THE COURT:** Okay.

16 **MR. HAFTER:** Almost -- it's never worked.

17 **THE COURT:** Okay. Well, you should be able to call
18 and leave a message for them to call you back at a certain
19 time.

20 **MR. HAFTER:** We've tried and luckily he calls in a --

21 **THE COURT:** Okay.

22 **MR. HAFTER:** -- very frequent amount but it's
23 difficult, your Honor, and what should happen and what does
24 happen are two different things and that's one thing that I'm
25 hoping you understand throughout all these arguments. What

1 should happen in prisons is not what happens in prisons and
2 I've got to say, I've never done prison law before but this is
3 an eye-opening situation. I am shocked and dismayed at what's
4 gone on here. The calls and letters that we receive from
5 inmates across the department are highly supportive of this
6 case, highly supportive of the work that this office has done.
7 They're watching us, the inmates are and we get stories from
8 inmates all over that things that should be happening are not
9 happening but that's not before this Court right now.

10 So I'd like to focus on the questions that you
11 listed. Let me talk a little bit about sources of kashruth and
12 understanding kashruth. First of all in Judaism, there's three
13 different primary groups. There's the Reform, Conservative and
14 Orthodox. The Reform outwardly admit -- and we provided a
15 brief reference to it this morning -- that halakha or Jewish
16 law has no real place in Judaism. Judaism in the modern world
17 is more about culture and tradition and the like. The Orthodox
18 believe strict compliance with the law, back to the oral of the
19 Torah or the Bible and it's strict compliance and within each
20 -- and the Conservative somewhere in the middle. They believe
21 in Jewish law but they believe it could be evolved and changed
22 based on rabbinic guidance.

23 There's a reason why -- oh, excuse me. Within each
24 sect are different schools. There are different synagogues.
25 There are different groups. One thing I want you to notice

1 today is the support that we have throughout the community. We
2 have rabbis here that are not just Chabad. They're from
3 various other Orthodox institutions, Kollel and the like. You
4 can generally tell by their beard length the different sects
5 but the fact of the matter is the Orthodox rabbis when it comes
6 to kashruth work as a whole and that's why generally there's
7 not one rabbi who gives a certification and we need to make a
8 very clear difference between certification and saying
9 something is a supervision.

10 Certification is generally done by a group of rabbis
11 across the spectrum in the Orthodox community because they want
12 to make sure that they're complying with the letter of the law
13 which is what the Va'ad in Greater Seattle is. The Va'ad
14 HaRabonim is a collection of various rabbis from different
15 Orthodox communities that come together to create -- to ensure
16 that the standards used in that community comply with the
17 letter of the law under the Torah and the related authorities
18 therefrom.

19 It doesn't matter whether you're from Seattle or Las
20 Vegas or Reno or Israel or Russia, kashruth is kashruth, kosher
21 is kosher and that's the real point that we need this Court to
22 understand is that there's a certain --

23 **THE COURT:** But you're telling us that in California
24 there is a different standard than they use there. So is that
25 just a different standard --

1 **MR. HAFTER:** What --

2 **THE COURT:** -- within the religion, not a legal
3 standard or a --

4 **MR. HAFTER:** And if you're taking that from today's
5 opposition of the surreply, if I didn't use the exact words, I
6 beg your -- as I said in --

7 **THE COURT:** Okay.

8 **MR. HAFTER:** -- the first line, I beg your patience
9 on, you know, responding to something that was filed at 3:00 in
10 the morning. What I was trying to suggest is for him to come
11 in from the California prisons and say -- because I am at the
12 California prisons so I could address the Nevada prisons -- for
13 that rabbi to do that is improper because the California system
14 -- the California policy within the prison -- the prison policy
15 is different than the common fare. As I provided the policy to
16 this Court, the policy on Page 4 says that a -- every facility
17 where there's kosher meals served shall have a full-time
18 rabbinic supervision or supervision from an appropriate
19 chaplain.

20 That's what we've been suggesting this whole time is
21 the main defect in the problem with the common fare menu is you
22 have food that's being prepared at these prisons without the
23 ongoing, continual full-time supervision and they say, but
24 we're going to have random checks. There's nothing random
25 about going to a prison. You have to call ahead. You have to

1 get permission. You can't just show up and get in. Even when
2 you show up, it takes time before you get in and so, you know,
3 who's to say they don't clean something up or prepare or have a
4 different standard when the rabbi comes and does his check and
5 moreover because of the nature of a prison, the rabbi's
6 authority to really be independent is hampered. They don't
7 have the ability to say, this needs to be changed. This needs
8 to be moved or the like like most supervising rabbis do in
9 normal commercial food preparation because of safety issues and
10 the like.

11 So we need to make sure that there is a system here
12 that ensures that from day to day there's supervision to make
13 -- that everything is going properly and that's the big issue.

14 **THE COURT:** Well, won't this individual be contracted
15 with the Department of Prisons so they'll be a set standard --

16 **MR. HAFTER:** Absolutely.

17 **THE COURT:** -- in place as what the authority is --

18 **MR. HAFTER:** Absolutely but they're offering to do
19 that, your Honor.

20 **THE COURT:** -- and responsibility.

21 **MR. HAFTER:** Sorry, I didn't mean to interrupt.
22 They're not offering to do that, your Honor. They're not
23 offering to provide full-time supervision. What they said is
24 this rabbi from California is available to come over for spot
25 checks. You know, I think what they were trying to do is fill

1 Rabbi Bronchtain's spot with this rabbi and, you know, Rabbi
2 Bronchtain was only scheduled to come in four times a year and
3 that's not ongoing, continuous supervision and what I was
4 trying to say about the different standards is in the
5 California kosher food system, the policy is very clear. At
6 all times they have that rabbinic supervision that's onsite.

7 So, you know, it's interesting that they're going to
8 use a rabbi from California, rely on California standards for
9 running kosher programs at a prison and yet they're not going
10 to adopt the most critical standard there is by having full-
11 time supervision. The other issue that --

12 **THE COURT:** Maybe I misunderstood. So you're saying
13 the California standard is better --

14 **MR. HAFTER:** Absolutely.

15 **THE COURT:** -- because they have --

16 **MR. HAFTER:** Absolutely but --

17 **THE COURT:** -- okay. I thought you were saying it
18 was worse. Okay.

19 **MR. HAFTER:** We have a problem with the rabbi, okay,
20 because that rabbi is not certifying the kosher program for
21 California as a whole. That rabbi is not providing that
22 policy-making decision. That rabbi is taking a set of policies
23 and standards and ensuring that they're implemented properly.
24 Those are two completely different issues and that's one thing
25 that we really need to stress for this Court is that, you know,

1 all the time -- we have restaurants all across the city here
2 and even these rabbis will go and kosher-ize a hotel here for a
3 special event but the people who supervise the food production
4 at the hotel for the event or at these -- are not rabbis with
5 extensive training and experience. You know, they're people
6 that understand the laws of kashruth and are subject to the
7 authority of the lead organization and so they simply
8 supervise, do a little bit of interactions and report back and
9 ask for changes to be made.

10 But we're having a problem that they have not
11 produced anyone that's certified the common fare menu as
12 overall being kosher and, you know, you made a statement about
13 how Document 47-6, Exhibit D is their kosher certification of
14 the common fare menu. It's not. What they did is they
15 provided lists of individual ingredients that have a kosher
16 certification when they're closed in the package as it is.
17 However, as we suggested from the KSA, from the head of the
18 kashruth, the same one that they're providing this list from,
19 we didn't take a generic letter. We took a very specific
20 letter and that rabbi urged this Court to recognize that not
21 only do you have to have kosher ingredients to make something
22 kosher, you have to have supervision, the proper utensils, the
23 proper segregation of different areas. It's a process and
24 understanding and creating the policy for that process requires
25 the implementation of a certifying organization. Now, I need a

1 -- I want to make a comment about that which --

2 **THE COURT:** Now, that wouldn't be --

3 **MR. HAFTER:** -- was not in the pleadings.

4 **THE COURT:** I'm sorry. Let me just interrupt before
5 I forget. Now, that wouldn't be required for all the other
6 dietary needs that are met by this particular menu, right?

7 **MR. HAFTER:** No, your Honor.

8 **THE COURT:** Okay.

9 **MR. HAFTER:** No, your Honor, and quite honestly, we
10 had no problem limiting the preliminary injunction just to
11 inmates who are Jewish and getting the kosher food menu
12 currently. We're fine with that. That's -- the other inmates,
13 their -- that's not our battle. This is solely expression of
14 free exercise of religion and that's where we're going to draw
15 the line for us.

16 What's interesting and I think it's a point that
17 needs to also be clarified is every community has their own
18 board of rabbis that does these supervision and oversight.
19 Seattle has. California has a ton -- New York, Denver, the
20 like. We have two. We have several rabbis who go out all the
21 time and certify restaurants, hotels, grocery stores and the
22 food that's prepared there, all right, and what's amazing to me
23 is that in their zeal to implement a common fare menu which
24 they're claiming is kosher, they've disregarded these rabbis
25 that were here in this community. They've shunned Nevada's

1 rabbis and said, no, we're going to go somewhere else. The
2 funny part is the Department of Corrections in the 1990s used
3 Rabbi Harlig, the head of Chabad of Southern Nevada as their
4 expert in a case. He came and testified in a matter. They
5 know they're here.

6 Why -- and this Court has to ask. Why are they in
7 such a rush to disregard the resources that we have in this
8 great state of Nevada? I don't know but instead, they're going
9 and getting a rabbi who has a Reform training which means that
10 he, by his own philosophies, do not believe in the stringencies
11 of Jewish law and having him fill in for the place of a rabbi
12 who said, you know what, without a certifying organization, I
13 don't feel comfortable providing ongoing supervision or
14 inspections. That's the point here. We need a certifying
15 agency and because they don't have a certifying agency or group
16 of rabbis that have said that the common fare menu is kosher,
17 we have significant concerns as to the kashruth of the menu.

18 Now, arguing in the alternative, I want it to be
19 clear that we're not saying the common fare menu can't work.
20 What we're saying is right now based on the information that we
21 have, we don't believe that it will work because they don't
22 have the ongoing supervision because there are some other
23 concerns that were raised such as the fact that their common
24 fare menu just simply lists product descriptions. It doesn't
25 say the brands that they're getting. So they haven't even said

1 in their common fare menu, you know, we're going to give X
2 brand of this on this morning. What they did is they're going
3 to say, we're going to give cold cereal and then they provide a
4 separate list that -- of ingredients and they're hoping that we
5 make the leap that those ingredients are what will actually be
6 used in this case.

7 And what happens if an ingredient isn't available for
8 -- on a particular order? What happens -- I mean, these are
9 questions. What can you substitute it with? These are the
10 issues that why you need ongoing supervision in part and -- but
11 they haven't provided a certification from an -- from a
12 standard. So that gets us to our preliminary injunction. We
13 don't need to prove a summary judgment standard. Matter of
14 fact, you asked us about this and -- technology is wonderful.
15 I have Westlaw and I'd like to point the Court's attention --
16 and I'm going to mess this up -- to *Gonzales versus O Centro*
17 *Espirita Beneficente Uniao do Vegetal* -- sorry, Court Reporter
18 -- 546 U.S. 418. It's a 2006 case and it was cited by a Ninth
19 Circuit Court in *Thalheimer versus City of San Diego*, 645 F.3d
20 1109 and it --

21 **THE COURT:** That's 645 F.3d --

22 **MR. HAFTER:** F.3d 1109.

23 **THE COURT:** -- 1109, thank you.

24 **MR. HAFTER:** And in that case, the Ninth Circuit
25 Court of Appeals stated -- talking about the first is a -- they

1 say that the Supreme Court affirmed reasoning that the burden
2 of proof of the preliminary injunction phase tracks the burden
3 of proof at trial and therefore RFRA challenges should be
4 adjudicated in the same manner as constitutionally mandated
5 applications of the test including at the preliminary
6 injunction stage, *id* at 430.

7 The Court relied on its earlier decision in *Ashcroft*
8 *versus ACLU*, 542 U.S. 656, 2004 decision in which it affirmed a
9 preliminary injunction against enforcement of The Child Online
10 Protection Act on First Amendment grounds and then they talk
11 about the proof at the preliminary injunction stage from the
12 *Ashcroft* Court and they said in deciding whether to grant a
13 preliminary injunction, a district court must consider whether
14 plaintiffs have demonstrated that they are likely to prevail on
15 the merits. It's not extraordinary proof.

16 It's a likelihood of success and so all we're
17 suggesting here is without the benefit of discovery, okay --
18 with limited information that was dumped on us four days ago,
19 we think we've raised substantial concerns as to the kashruth
20 of the common fare menu that would suggest that the
21 implementation for the Jewish inmates currently receiving
22 kosher food of that menu would be an undue burden on their free
23 exercise of religion. I mean -- and if you look at the lengths
24 the Defendants have gone to ram this down --

25 **THE COURT:** It's not undue burden. It's substantial

1 burden is the test.

2 **MR. HAFTER:** Correct, I'm sorry, your Honor.

3 **THE COURT:** It's substantial burden.

4 **MR. HAFTER:** If you --

5 **THE COURT:** It's clearly in burden but when you're in
6 prison, you're going to be burdened and that's -- and the law,
7 you know, makes room for that.

8 **MR. HAFTER:** Well, that's the point.

9 **THE COURT:** Yeah. And so the standard here, just to
10 be clear, is that no government shall impose a substantial
11 burden on the religious exercise of a person residing in or
12 confined to an institution even if that burden results from
13 rule of general applicability unless the government
14 demonstrates that the imposition of the burden on that person,
15 number one, is in furtherance of a compelling government
16 interest -- which here they have over a million-dollar savings.
17 So I think that's pretty compelling -- and is the least
18 restrictive means of furthering that compelling interest and so
19 that's the other thing that I'm looking at is whether it is the
20 least restrictive means or not.

21 **MR. HAFTER:** Right and the interesting part is they
22 haven't worked with us to -- or worked -- you know, they
23 haven't shown that they've worked with anyone to show that
24 that's the least -- this common fare menu is the least
25 restrictive means.

1 I want to point this Court's attention to another
2 decision that was recently released January 11th, 2012. It's a
3 California Third District Court of Appeals decision, *In Re: --*
4 here we go again -- *Margarito Jesus Garcia*, 202 Cal App 4th at
5 842. This decision was released on January 11th, 2012 and in
6 that decision they were -- the Court was trying to determine
7 whether or not the California prisons can deny a Messianic Jew,
8 a Jew who the mainstream rabbis didn't say was Jewish -- if
9 they could deny them Jewish -- kosher food and the Court of
10 Appeals said "No" and in that decision they had a lengthy
11 analysis of this exact issue, substantial burden.

12 And I want cite to something. They have the evidence
13 of the cost for California discussed in there and they said
14 that a regular diet -- first of all, they said at the time the
15 evidence was produced, there were 684 inmates who were
16 receiving kosher food in all of California's prisons and they
17 said that the regular diet costs \$2.90 a day. The vegetarian
18 option costs \$2.62 a day. The religious meat alternative diet
19 costs \$3.20 a day and the kosher food costs \$7.97 a day and
20 notwithstanding the Court of Appeals found that the added
21 expense of more than double, almost triple what the regular
22 meal costs was not the substantial burden for the government --

23 **THE COURT:** You mean was not a compelling interest.

24 **MR. HAFTER:** -- compelling interest -- excuse me,
25 your Honor. And furthermore what they -- the other point that

1 I want to take -- I would like this Court to take from it
2 respectfully is how much is Nevada paying per day under the
3 common fare menu and the regular menu versus how much is Nevada
4 paying for the current kosher meal compared to California? You
5 know, and obviously there are other prison systems all
6 throughout the country that are offering kosher diets, not
7 common fare diets, kosher diets.

8 This battle just occurred in Indianapolis in Indiana
9 not that long ago and in Indiana, same thing, kosher menu stuff
10 and they tried to raise costs and the district court there --
11 the federal court struck it down. The point was that the added
12 cost of the kosher menu wasn't a reason to deny kosher food in
13 that case as well but they haven't shown that they've looked at
14 any other prisons to implement what they're doing for kosher
15 food. They haven't shown what the cost per day for kosher food
16 is here, you know, and why there's such a huge discrepancy when
17 all they're doing is flying in meals.

18 **THE COURT:** Okay. In that case though, were they
19 looking at whether it was a substantial burden versus a
20 compelling government interest to provide a kosher menu at all
21 versus no menu or was it a situation like we have here because
22 they have a kosher menu?

23 **MR. HAFTER:** No, this --

24 **THE COURT:** The issue is they just want to try to
25 implement a more cost-effective kosher menu. It's going from

1 Kosher A to Kosher B versus kosher or no kosher.

2 **MR. HAFTER:** Right. Well, we don't believe that the
3 common fare is kosher -- so period, underscored. We've got to
4 draw the line there. That's our position --

5 **THE COURT:** Okay.

6 **MR. HAFTER:** -- and we believe because in every
7 community across this world in order for commercially-produced
8 food to be certified kosher, you need a proper -- a rabbinic
9 authority which is generally a council of rabbis that certifies
10 it -- every community across the country, across the world and
11 so until we see that, it's not kosher but they were looking at
12 whether or not they had a -- they were looking at the burden on
13 the prisons in California with respect to adding the Messianic
14 Jews to this diet that was already more expensive. So, I mean,
15 I think it is analogous.

16 What's interesting is we also provided an article to
17 this Court in the -- in our opposition this morning suggesting
18 that California is lining up if they're not already in
19 litigation on this same issue because they're facing budget
20 crisis and, you know, they're looking at alternatives or
21 they're denying prisoners the opportunity to get on the kosher
22 list. So we understand Nevada's goal now. It would have been
23 nice if they would have communicated it to us and had a
24 dialogue about these issues during the six months that was
25 intended to resolve this but they didn't but now this week we

1 understand it but we don't agree that that is -- overwhelms the
2 right for kosher food.

3 Now, getting back to some of the other questions --

4 **THE COURT:** Can you give me that *In Re: Margarito*
5 case again because I think I wrote down -- I wrote down 202 Cal
6 App 4th 842 and I think that's the wrong cite.

7 **MR. HAFTER:** 202 Cal App 4th 842.

8 **THE COURT:** Okay. That is what I wrote down. Okay.

9 **MR. HAFTER:** I just pulled it up from Westlaw not
10 that long ago. So we can get it to this Court. We can file
11 the opinion if you want.

12 **THE COURT:** That brings up *Mize-Kurzman versus Marin*
13 *Community College*. I'll try again and see if I put it in
14 wrong. Let me get the name and I'll just pull it up by name.

15 **MR. HAFTER:** That's the way I found it, your Honor.

16 **THE COURT:** It's *In Re: Margarito* --

17 **MR. HAFTER:** Excuse me, your Honor. Try 202 Cal App
18 4th 892.

19 **THE COURT:** Ah, okay, 892. Thank you.

20 **MR. HAFTER:** Okay. That --

21 **THE COURT:** So now you know I'm really checking.
22 Okay. Okay, so my understanding is what you really want and
23 what you think would really be legitimately kosher is if there
24 was a council of rabbis and you would prefer a Nevada council
25 of rabbis who could supervise the preparation area and the

1 actual preparation of and the materials -- not materials, the
2 items that are used 24/7?

3 **MR. HAFTER:** Yes, your Honor.

4 **THE COURT:** Okay.

5 **MR. HAFTER:** Or to have the council of rabbis certify
6 that even without that ongoing, 24-hour supervision, it's
7 kosher. We'll defer to a council of rabbis that's an Orthodox
8 council of rabbis.

9 **THE COURT:** And so, for example, in this case we had
10 Chaplain Friedman and I -- you know, I'm -- and I apologize
11 that I don't know enough about this but it caused me to think
12 of, oh, like an Army chaplain, you know, a chaplain that's, you
13 know, kind of non-denominational in the sense that, you know,
14 he serves the religious needs of many different individuals as
15 opposed to just one particular congregation and one particular
16 religion. So is that what Chaplain Friedman is like or is the
17 chaplain just lower than a rabbi in some sense?

18 **MR. HAFTER:** No. To give him credit as we have, he's
19 Jewish. He has education on the laws of kashruth. He provides
20 outreach to Jewish inmates. He's Jewish for Jewish inmates.
21 The difference is he doesn't have the ordination of a rabbi and
22 so what happened was though is he's been one of these
23 supervisors, you know, front-line guys who are working under
24 the authority of, in this case, the Va'ad HaRabonim of Greater
25 Seattle or the Council of Rabbis from Greater Seattle and what

1 he did is he used a letter that they provided saying that he
2 has this knowledge and experience to supervise and he -- and
3 the key language in that letter was in -- I think it was
4 connection or with this board and he went out and sold himself
5 as an expert to Nevada but the board had no idea what he was
6 doing, didn't approve of what he was doing and so they wrote a
7 letter saying, wait a minute. Not that we can't approve the
8 common fare menu but we're not involved in this. We have no
9 idea what's going on and Rabbi -- excuse me -- and Mr. Friedman
10 doesn't have the authority to certify the common fare menu.

11 **THE COURT:** So he has the authority to certify if he
12 runs it by them and they approve it but --

13 **MR. HAFTER:** No, the --

14 **THE COURT:** -- if you didn't run it by them, then he
15 can't?

16 **MR. HAFTER:** -- the board will certify.

17 **THE COURT:** Right.

18 **MR. HAFTER:** Okay. He would do -- once it's
19 certified, he would do the inspections.

20 **THE COURT:** Okay.

21 **MR. HAFTER:** He would be the liaison between the
22 board and the prison, in other words.

23 **THE COURT:** So he's their agent but only with --
24 related to the authority provided to him --

25 **MR. HAFTER:** Exactly.

1 **THE COURT:** -- case by case?

2 **MR. HAFTER:** Exactly.

3 **THE COURT:** Okay.

4 **MR. HAFTER:** And so because he's not an ordained
5 rabbi who sits on a board of other Orthodox rabbis that are
6 heterogeneous throughout the Orthodox community, he really
7 doesn't have any credence to make any issuances of authority
8 for certification and you ask, well, why is -- if he's
9 knowledgeable, why can't he supervise and it's because
10 preparation of food changes -- I mean, there's millions of
11 ingredients and things come up all the time that, you know,
12 rabbis scratch their head and they go to their rabbis on, you
13 know, and so the problem is he doesn't have the ability to make
14 the real decisions on halakha law if there's an issue that
15 comes up because he doesn't have the -- it's kind of like, as I
16 mentioned in the brief, a paralegal, you know, stepping in the
17 shoes of the Court.

18 And that's the problem that we have with the
19 California rabbi that they've now provided is he's Reform. He
20 doesn't believe -- well, I don't know what he believes. I've
21 never met the guy but Reform Judaism does not believe in the
22 role of halakha or Jewish law in the modern world. So how
23 could he make decisions on Jewish law when he's presented with
24 them in this case if by his own training and ordination, his
25 movement doesn't believe in a role of halakha in the modern

1 world? And I've just got to say as an aside, this is really
2 cool to be able to argue Jewish law in front of a civil Court
3 for me but -- a couple other issues addressing your concerns.

4 I want to talk about Ackerman's non-kosher purchases.
5 You stated that are we denying -- we're not denying the
6 purchases and there's two funerals in the community, your
7 Honor. So they wanted to support the Court but --

8 **THE COURT:** I appreciate you coming. Thank you.

9 **MR. HAFTER:** First of all, I've talked to
10 Mr. Ackerman limited occasions about his non-kosher purchases
11 primarily because of time and it's sometimes hard to have
12 conversations over the phone with counsel and this is still a
13 pro-bono case for me. So flying up to Lovelock every chance I
14 need to, it's a bit difficult but I think it's telling that in
15 the pile of papers that they've filed in their opposition --
16 their motion to dismiss, there were grievances specifically
17 discussing the canteen's purchases, that Mr. Ackerman was
18 grieving the fact that items were listed as kosher which were
19 not kosher on the canteen list, that vice versa, items were
20 listed as not kosher that were kosher on the canteen list and,
21 you know, he would order things and then get substitutions.
22 You know, so there's no evidence that he ordered those even
23 though his account was burdened with those items, first of all.

24 Second of all, there's no evidence that he ate those
25 items. We know that inmates use whatever they can for currency

1 and trade them and so, you know, to ding him because he has
2 non-kosher food that's hit his account I think is a large leap.
3 They tried this in Traver (phonetic) Greens' case actually.
4 Traver Greens called me this morning right -- because he knew
5 we were having this hearing and he said, you know, I've been
6 reading these and they tried that on my case and it's not fair
7 because I wasn't eating those. I didn't order those. Now, I
8 don't know whether or not Mr. Ackerman ordered them or not. I
9 haven't been able to speak to him about that topic because
10 there's so many other things we've been addressing but even if
11 he did --

12 **THE COURT:** Okay. Well, the law does require a
13 genuine belief. So, I mean, it's a valid defense for them to
14 raise it.

15 **MR. HAFTER:** Absolutely. But even if he did, the
16 last item was ordered February 24th of 2011. In eleven months,
17 he hasn't ordered it, okay, and, you know, how long does he
18 have to go not eating kosher food to be deemed a proper kosher
19 plaintiff? I mean, isn't the whole point of the prison system
20 in some respect, you know, rehabilitation? If he's evolving in
21 his religious practices and he was not eating non-kosher for
22 several months before this case was even filed, you've got to
23 ask yourself, well, it's not like he ordered it last week and
24 so putting everything together, I would ask that he not be
25 dinged with that.

1 Similarly, the only other issue that they raised in
2 their class certification opposition was, well, he's had these
3 incidences with this other inmate, the enemy, so to say which
4 it's fascinating because there's absolutely no evidence
5 provided to this Court that such enemy exists. There's nothing
6 provided in camera to reveal the identity of this person.
7 There is nothing provided in the record to provide the
8 identity. They said that, oh, he conspired with somebody to
9 assault another Jewish inmate. The fact of the matter is he
10 was cleared of those charges. I've got some real
11 constitutional issues, your Honor, with them raising that here
12 to stop him from serving as certification of his class as a
13 lead plaintiff when he was cleared of those charges.

14 But notwithstanding as you said, this may actually
15 bring these people together and moreover there's no evidence
16 that this enemy would object and finally I don't think that
17 there is an ideal plaintiff in the entire prison population
18 that hasn't made one enemy. I've never been in prison, thank
19 God, but I could imagine that they have to look out for
20 themselves every single day and it's not the best environment
21 and I don't think that we would be able to find that.

22 Ideally, I would like some time to look at the issue
23 of exhaustion with respect to opting and opting out. I don't
24 think that that was raised by them and I think that's an
25 interesting question. I would find it really difficult, your

1 Honor, to believe that if there's an issue of this caliber
2 that's this widespread and this applicable to every -- to such
3 a class -- I mean, this is an ideal class.

4 **THE COURT:** Was it raised about a hundred inmates?
5 Is that --

6 **MR. HAFTER:** I don't know.

7 **THE COURT:** I don't remember who gave me that number.
8 Maybe it was --

9 **MR. HAFTER:** It was in their motion.

10 **THE COURT:** Okay. Yeah.

11 **MR. HAFTER:** And I don't remember the number, your
12 Honor. And still, again, we still haven't had discovery, so I
13 don't know if that's true or not.

14 **THE COURT:** Right.

15 **MR. HAFTER:** But, I mean, I would find it hard to
16 believe that if you've met the burden to open the suit, survive
17 a motion to dismiss, under the Prison Litigation Reform Act,
18 that -- and it certifies as a class, because you meet the class
19 surrogate (phonetic), that -- you then have to brief every
20 single person that wants to join that class. And I would like
21 to have the opportunity to look at that, because that's an
22 issue that you're going to consider.

23 But, in the alternative, we would like to ask that
24 the class be certified in such a manner where prisoners have
25 the ability to opt out. These prisoners have already taken

1 substantial steps to request kosher food, to get on a kosher
2 food menu. They have had to go through interviews and sign off
3 by rabbis and the like. They've done a lot of work here. And
4 to now ask them to opt into a suit to just simply preserve what
5 they fought so hard to get on I think is adding more work for
6 them and our firm than, you know, is really necessary under the
7 goals of both the Prison Litigation Reform Act and supporting
8 constitutional rights in this Court.

9 **THE COURT:** Well, I didn't find any case law as to
10 whether or not it was an opt-in or an opt-out basis. So, I
11 don't know if no Court has decided that question yet or if I
12 just didn't have enough time --

13 **MR. HAFTER:** Your Honor, to give you --

14 **THE COURT:** -- to look it up.

15 **MR. HAFTER:** Without sounding suck-upish, it's an
16 interesting academic question, and we had never thought about
17 it. So, we'd like the ability to at least look at that.

18 **THE COURT:** Okay.

19 **MR. HAFTER:** We actually, on the ultra vires act
20 issue --

21 **THE COURT:** Uh-huh.

22 **MR. HAFTER:** -- we actually were planning on filing a
23 motion for leave to amend. The problem was, was we were under
24 the assumption that you were going to also address or rule on
25 the motion to dismiss. We didn't want to file a motion for

1 leave to amend if you were going to dismiss it today.

2 **THE COURT:** Uh-huh.

3 **MR. HAFTER:** We're trying to preserve some
4 efficiencies --

5 **THE COURT:** Yes.

6 **MR. HAFTER:** -- in this Court.

7 **THE COURT:** Yeah.

8 **MR. HAFTER:** Just a few more issues you raised.

9 I want to talk about this retaliation. And in some
10 respect my question is: What proof would we have had to bring,
11 given the fact that I can't have Mr. Ackerman wrap up his food
12 and send it to a rabbi and say, "Is this kosher?" You know, if
13 he's given meat that's in a saran wrap, obviously, the package
14 is open. And as the defendants have said, "Well, no, in order
15 to make sure the common fare menu is kosher, we're never going
16 to give an inmate an open package of meat. It's always going
17 to be sealed," they recognize it has to be sealed. So, when
18 Mr. Ackerman is providing this Court an affidavit saying that
19 he received meat that was in saran wrap, you've already opened
20 the door to think that it's not kosher.

21 And that's why we didn't just say we wanted an order
22 to show cause. We wanted an order to show cause or, in the
23 alternative, an evidentiary hearing. Because we'd like to be
24 able to bring Mr. Ackerman on the stand in front of some
25 rabbinic expert, ask these questions, and then say, "Based on

1 what you heard, Rabbi, you know, what do you think?" I think
2 that that's at least fair under the circumstances.

3 The other point that I really want to make, and we
4 didn't have the opportunity to raise this in the pleadings as
5 well as I would like --

6 **THE COURT:** But that's not necessary if I'm going to
7 be granting the preliminary injunction.

8 **MR. HAFTER:** Well, you --

9 **THE COURT:** Right?

10 **MR. HAFTER:** You're right, your Honor.

11 The other issue, your Honor, that I'd like to address
12 is I do not think -- originally I did. I'm a little bit more
13 cynical than most. And originally when Howard was telling me
14 about what he was experiencing on a daily basis, I thought he
15 had a sympathetic ear and he was abusing that. I first met
16 Howard in person January 18, 2011, when I went to Northern
17 Nevada Correctional Center. They knew I was coming. We had to
18 make an appointment time in advance.

19 **THE COURT:** Well, I realize you have a Rule 11
20 requirement to not file something that you believe is
21 frivolous, so I am assuming that you do believe --

22 **MR. HAFTER:** Well --

23 **THE COURT:** -- that he does actually have --

24 **MR. HAFTER:** Well, but the point I would make, your
25 Honor --

1 **THE COURT:** -- a true and honest cause of action.

2 **MR. HAFTER:** -- is it's not coincidence, in my mind
3 anymore, that all of his troubles started that morning that I
4 arrived. They put a white supremacist in his jail -- in his
5 cell that morning with him. All right? And then all of these
6 charges and allegations started after that time period.

7 And I think, quite honestly, they were setting
8 themselves up to do whatever they were going to do because
9 Mr. Ackerman had contacted counsel and was willing out of --
10 and we spoke with numerous Jewish inmates, your Honor.
11 Mr. Ackerman was the only one that really had the chutzpah to
12 stand up and say, "I'll represent the class; I'll go against
13 the department in this case." And that's why -- and we
14 screened them. We said, "Do you keep kosher?" "Yes." "You do
15 the --" "Yes." And, you know, and we did our homework.

16 And the same day he all of a sudden starts to have
17 problems? You know, and then he has these trumped-up charges
18 that are dismissed? And then they say, "Well, because you have
19 this secret enemy, which we're not going to disclose, we're
20 moving you to Lovelock." I just think at some point we've got
21 to say, "Wait a minute; what's going on here?" And that may be
22 ultimately on the charge of retaliation, a definitive issue of
23 this case, but I think there is enough there to at least ask
24 some questions or enter into an evidentiary hearing.

25 I think I have answered all of your questions, your

1 Honor.

2 **THE COURT:** Okay. Well, I don't think we need to
3 have an evidentiary hearing on the retaliation issue. I think
4 that's something that you can, along with the other questions
5 that you had, you can get into in discovery with
6 interrogatories and requests for documents.

7 I'd like to hear from the defendant as to whether or
8 not a preliminary injunction should issue as to just
9 Mr. Ackerman or whether it would be all of the inmates who are
10 currently receiving a kosher meal and as they enroll into the
11 program would also be entitled to opt out of that --

12 **MR. GEDDES:** Thank you, your Honor.

13 **THE COURT:** -- common fare menu. I really don't want
14 to enjoin the prison entirely from implementing this menu, if
15 possible. You know, you'll do your own cost-benefit analysis,
16 I'm sure, whether it's worthwhile to implement it for just the
17 other individuals. I don't know what your numbers are for the
18 other individuals that have dietary needs that this would meet.
19 So, let me know.

20 **MR. GEDDES:** Thank you, your Honor. Again, Will
21 Geddes for the defendants, coming from Carson City this
22 morning. I'm a little tired. Obviously, I had a late filing
23 last night, and I apologize if I'm a little slow today.

24 Your Honor, there were a lot of statements made, and
25 I want to ask -- answer the Court's first question most

1 directly up front --

2 **THE COURT:** Uh-huh.

3 **MR. GEDDES:** -- and then I think, in fairness to my
4 client, we need to round out this discussion with a fair
5 counterpoint.

6 I haven't thought about it, so I don't have a direct
7 answer to the question that you posed. It's an interesting
8 question, and I will take it back to my client, the question
9 being whether or not there could be a partial potential
10 injunction for a limited number of inmates versus others.

11 But I have to say -- and I was first introduced into
12 inmate litigation for the Attorney General's office in 2005, so
13 I've seen a lot of issues; I've seen a lot of lawsuits; I've
14 defended a lot of lawsuits; dealt with a whole gamut of
15 constitutional law; done trials. So, I'd like to think I have
16 some familiarity with inmate litigation, but I want to,
17 obviously, you know, profess the requisite humility. So, I
18 just want to give that factual background.

19 One of the problems that I see -- and it will require
20 me to vet it. The problem is RLUIPA is as close as you're
21 going to get to strict liability. It is very, very hard to
22 defend against RLUIPA. And, so, what happens is you will have
23 a bunch of inmates who say, "Did you hear the news?" "What's
24 that"? "The official Orthodox inmates get to get a kosher meal
25 of a higher variety, a more costly variety." "Well, we haven't

1 been ordained, we haven't been recognized by Aleph, there is no
2 outside organization certifying us, we haven't been born a Jew,
3 we haven't been converted through the -- certain protocols to
4 be a Jew."

5 And I will not stand before this Court and say that
6 this is my legal conclusion, but I think an argument can be
7 made, one which we would have to defend, that it doesn't matter
8 if someone on the outside world recognizes you. Someone could
9 argue that RLUIPA is so severe and onerous that if a person
10 were a Catholic on day one, a Muslim on day two, a Protestant
11 on day three, and on day four decided they not only wanted to
12 be Jewish, but a particular type of Jewish inmate, one could
13 argue that RLUIPA requires that recognition, notwithstanding
14 these outside protocols.

15 So, stated another way, someone could wake up on a
16 Wednesday and say, "You know what? I had a dream last night,"
17 and they could be perfectly sincere. I'm not being facetious
18 at all.

19 **THE COURT:** I see where you're going, and I think I
20 already had brought this up, because it occurred to me as well,
21 you don't want an avalanche of inmates now all of a sudden
22 saying, "Well, we're kosher, too." But my thought process was,
23 well, how do you make that decision now, and why wouldn't you
24 be able to just implement the same procedure that you use now
25 to determine who does and doesn't get a kosher menu?

1 **MR. GEDDES:** Thank you, your Honor.

2 The procedure is very inmate favorable. Now, when I
3 say "the procedure," I am not talking about an historical
4 procedure going back several years. I am talking about a very
5 liberal policy that is currently in effect at NDOC. And that
6 policy -- and it's reflected in ARV 14 -- says, "Look, Mr. or
7 Mrs. Inmate, you come to us; you say that you are religion X,
8 Y, or Z. This is not the Spanish Inquisition. We are not here
9 to get in -- we are not the religion police. We are not here
10 to doubt you just because we want to doubt you. We're not here
11 to doubt you because some organization hasn't certified you."
12 Instead, if there are articulable -- the same Terry stop
13 criminal procedures -- if there are articulable facts upon
14 which to base a reasonable suspicion that this person is not
15 sincere, then we will either reserve our right to go against it
16 later or deny you now.

17 In essence, the policy now is: If we deny you, it
18 means we're willing to take you on in court. And the challenge
19 with that is the prison may not have information up front, or
20 it may get a request from a religion, a brand new religion, the
21 religion of Hawaii, or the religion of Kentucky; just, "It's my
22 religion; it doesn't have to be a mainstream religion, and gosh
23 darn it, I require kosher meals." How is the Nevada Department
24 of Corrections, then, to say, "Well, we've got one guy in
25 Lovelock who says this, and, you know, it's going to cost the

1 State of Nevada, you know, \$17,000" -- I'm just making up a
2 number -- "to figure it out, to hire an expert." Does this
3 seem like this is a substantial burden? And because RLUIPA is
4 very -- has tension within itself, that the practice that is
5 allegedly burdened doesn't have to be a mainstream practice,
6 yet in the same statute it has to be a substantial burden. So,
7 there is a tension there.

8 The point being that the trends that we've seen --
9 we've produced documents and evidence to this Court already in
10 our opposition to their motion for preliminary injunction, the
11 declaration of Deb Reed, and the exhibits attached thereto --
12 which is authenticated; it's proper evidence before this
13 Court -- that shows several years ago there were seven or so
14 inmates -- I may have my number off -- and now, in 2013, there
15 is going to be a projected number of over 500. The issue that
16 the NDOC thinks has happened is that there has been this
17 bandwagon effect. And that is the reason why it has driven
18 costs so high.

19 So, if this Court were to entertain a sort of
20 fashioned together injunction, we have every reason to believe,
21 and we believe we have already established that phenomenon in
22 the record, that there will be a jumping.

23 The other problem is, is if this Court were to say,
24 "No, no, that's fine; we sympathize with the NDOC; only those
25 who are certified by Aleph or by some outside organization or

1 who were born Jewish or who converted to Judaism" -- which can
2 be very difficult in prison -- "then we now face an equal
3 protection problem, a lawsuit in that regard."

4 Now, if the Court wants to issue the order, the
5 Court's going to --

6 **THE COURT:** But you do now already anyway.

7 **MR. GEDDES:** I'm sorry?

8 **THE COURT:** But don't you already face that problem
9 now anyway?

10 **MR. GEDDES:** An equal protection -- well, not in --
11 not -- we get -- the NDOC receives suits all of the time for
12 violations, a variety, including equal protection. But in the
13 context of that, we are providing a standardized, uniform
14 kosher meal, which we believe is kosher, to all of the inmates.
15 There isn't the differential treatment aspect of an equal
16 protection claim.

17 And, so, -- so, we -- I guess at this point all I'm
18 saying is, is I -- I'm not sure if that's a workable solution,
19 but I'd certainly take that back to my clients. Absolutely.

20 One of the things that I'd like to address, if I may,
21 your Honor, the points that were raised by opposing counsel,
22 and then to the degree that I -- I've written notes where
23 they -- I don't believe they were responsive to other questions
24 you asked, I'd like to answer those.

25 **THE COURT:** Please.

1 **MR. GEDDES:** I would like to say at the outset -- and
2 I actually started to draft a brief a couple days ago
3 requesting a status conference with this Court for purposes of
4 avoiding wasteful practices. And I thought better of it, and I
5 thought, I've got so much to do in this case, I'll just put
6 that aside.

7 I hear rhetoric from the other side that they're
8 shocked that we're doing document dumps, that we -- we're
9 engaging in unfair practice, and that Mr. Ackerman is -- has a
10 very strong reputation and he's being unfairly -- he's put in
11 an unfair light. I would like to say I cannot remember a
12 time -- and I may stand corrected by the record, and if
13 somebody went back to all of the filings I've done since I've
14 been barred, they may find that I'm wrong -- so I'm saying I
15 cannot remember a time when I have been called or my client has
16 been called a liar, or that we lied, so many times. And it's
17 so offensive to me.

18 **THE COURT:** I agree, and I noticed that in there.
19 When I did read it, I was surprised, and I don't approve of the
20 use of that word in this particular content. And it is
21 important for all of us to understand that while sometimes when
22 we're talking about religious issues, sometimes emotions can
23 get in the way. But this is a court of law. These are
24 documents that are filed in a court of law. We need to
25 remember that we are all officers of the Court and that we need

1 to keep that demeanor standard high and the civility and to
2 understand that we're all doing our job the best that we can.
3 Yeah.

4 **MR. GEDDES:** Thank you, your Honor.

5 **THE COURT:** Yeah. I --

6 **MR. GEDDES:** I'll just move on from that point.

7 **THE COURT:** I'd appreciate if we don't use that kind
8 of name-calling anymore. I understand what you mean when you
9 use other words instead, like he misinformed the Court. I know
10 you mean he's calling him a liar; but I'd rather if you'd use
11 the word "misinformed" instead of straight-out "liar," and
12 let's just keep it more civil.

13 **MR. GEDDES:** Thank you, your Honor.

14 The other challenge that I have here -- and I
15 understand that the Court has invited the discussion, so I'm
16 not being critical of the Court -- is that opposing counsel has
17 done what I had predicted in one of my motions. I believe it
18 was a motion for clarification. And perhaps -- perhaps there's
19 not much to be done about it. Perhaps we're at a stage now
20 where the Court's inviting discussion that touches and concerns
21 expert thought and opinion and religious theology.

22 But I want to say that -- and I just want, for the
23 record, to interpose an objection to what I consider to be
24 testimony in the form of argument. We've heard a lot about
25 what religions are. We've heard a lot about what you can and

1 cannot do. And, so, I believe the proper place for that is
2 with competent evidence in the form of declarations,
3 affidavits, depositions, and the like.

4 And, so, I, obviously, as a non-Jewish person, I
5 cannot, as an attorney, you know, pace for pace, advise this
6 Court of Jewish law. And, so, to the degree that I believe our
7 client is prejudiced in such a discussion, I would interpose an
8 objection and ask the Court to assign an appropriate weight to
9 what it has heard in that regard.

10 Now, there are things that we can talk about, factual
11 things, things that we have in the evidence. Plaintiff's
12 counsel stated he doesn't have an expert. And, so, I'd like to
13 say what it is we're here today to talk about. We're not here
14 today to see if the State of Nevada can, you know, Harry
15 Houdini its way out of a substantial least restricted --
16 substantial burden, least restrictive half nelson. That's not
17 why we're here. We're here today because plaintiffs, who have
18 the burden, have filed a motion for a preliminary injunction.

19 And, so, it's understandable that we've sort of
20 strayed from that, but let it not be forgotten that it is their
21 burden, it is an extraordinary form of relief, and he has
22 confused the idea of a standard with proof. A person could
23 have a high or a low standard, but you still have to come
24 forward with proof. And we've briefed this in our --
25 extensively in our brief.

1 Now, you've heard from opposing counsel that, "Well,
2 what do you want us to do? We don't have any information."
3 Your Honor, that statement, in and of itself, warrants denying
4 the motion.

5 Now, we've talked about what should -- he's talked
6 about what should happen and what does happen in prison. And
7 to be fair to opposing counsel -- and I applaud his candor --
8 he doesn't have any experience in inmate litigation. He has
9 stated that. I will represent to this Court that I have a lot
10 of experience in inmate litigation, and I represent that to the
11 Court for the very reason that there is a whole other world out
12 there in the prison world. And it is common -- I get this from
13 attorneys who will represent a plaintiff and they're new to the
14 area, and it's understandable that they would have a sense of
15 shock and horror about what goes on in prison.

16 The famous case on deliberate indifference, Eighth
17 Amendment, says the constitution doesn't outlaw cruel and
18 unusual conditions; it outlaws cruel and unusual punishments.
19 The idea is that prison is not where anybody wants to be.

20 And I once had a case -- and I was before Magistrate
21 Judge McQuaid, who is now retired. And there was an inmate
22 with a similar situation with an attorney. In that fact
23 pattern, I'll represent to the Court, the evidence is there,
24 that it was alleged -- I'll say alleged -- that a particular
25 inmate had a girlfriend who smuggled in heroin, an escape key,

1 and, I believe, a knife. Now, this inmate was in lockdown. He
2 was protected from everyone. No one could get to him. And he
3 was saying how scared he was. He wanted to be transferred to
4 another prison. And Honorable Magistrate McQuaid said to me,
5 "Mr. Geddes, he's scared; you know, why don't we just transfer
6 him?" And I said to him, "Your Honor, prison is a scary place.
7 I wouldn't want to be there. But that's not the standard. The
8 standard is not whether prison is scary; the standard is
9 whether or not prisons are complying with federal law and with
10 the constitution."

11 And, so, we can't walk into this discussion with the
12 idea that we have all the niceties and all the conveniences of
13 the free society. We do not. So, to the degree that opposing
14 counsel finds it difficult to contact his client or that it's
15 loud and he can't hear it, those are the situations of prison.

16 Now, in contacting an inmate at the prison, there is
17 a -- and you may be familiar with --

18 **THE COURT:** Okay. Let me just -- we're kind of
19 getting off track here. Let me just let you know, in my prior
20 life I represented Clark County in jail litigation. So, I
21 understand what you're talking about. And before that I
22 represented numerous defendants and went to jail every single
23 day and had to visit prison many times as well. So, I
24 understand all that, and I'm comfortable with the situation
25 that you all are explaining. I understand it.

1 There are issues that you -- that -- there are facts
2 that you cannot provide at this point. That's what discovery
3 is for. I think it goes to -- in a preliminary injunction
4 there needs to be a showing of likelihood of success on the
5 merits. So, naturally, you have to address the merits. You're
6 not going to have all of the information because discovery
7 hasn't even started yet. But what you do have is what I look
8 at. And, so, I understand that it isn't as much as you would
9 have at the end of trial, and I would never, and I don't think
10 any court would, ever assume that you could.

11 But the question is: What do you have? And what
12 they have here that they have provided is that there is a
13 change in the menu, which I think is uncontested; and that it's
14 no longer going to be prepackaged, kosher items, but, rather,
15 instead, we're going to try to see if we can't save some money,
16 as most people have been doing for the last couple of years --
17 because I'm not going out to dinner as much as I used to; I'm
18 making dinner at home now. And I think that's all the prison
19 was trying to do was save some money by not buying a bunch of
20 overpriced -- or maybe they're legitimately priced -- but, you
21 know, a bunch of items that cost more than if you just made it
22 at home, made them in the prison.

23 And, so, the question is whether or not the prison
24 has the ability or is willing or -- to provide the kosher meal
25 that would actually be kosher if you make it at home as opposed

1 to buying it from, you know, some other agency. So, I think
2 that evidence has been provided, and I don't think that you are
3 denying that there is a change in the menu, that the menu does
4 call for making the food at the prison as opposed to importing
5 it, and that the question is whether or not the prison is
6 capable at this point of providing a meal that is prepared on
7 site which is actually kosher and is not a substantial burden.

8 And, again, I'm very aware that's not just an undue
9 burden or a shocking burden; it's a substantial burden. It
10 needs to be a substantial burden that is not justified by the
11 compelling government interests and looking at the, you know,
12 the public interests as well, which is to save money in a time
13 like this. It's very important to keep track of that.

14 So, I realize that it's going to be a burden. The
15 food is probably not going to be as good or -- I don't know;
16 maybe it will be just as great. But we need to save money, we
17 need to figure out a way to do that, but we need to make sure
18 that we comply with RLUIPA when we do this.

19 So, I just wanted to -- not to mean to cut you short,
20 but just to, hopefully, satisfy you that I understand that we
21 are just focusing here on what the information is that's been
22 provided at this time.

23 **MR. GEDDES:** Okay. Thank you, your Honor.

24 I'm not sure it's a correct assumption to say that
25 before we had prepackaged food and now we don't.

1 **THE COURT:** Okay.

2 **MR. GEDDES:** The only food that I'm aware of that is
3 not prepackaged are their vegetables and the fruit. All the
4 items come to the prison in a factory-sealed container: the
5 meat, the tuna, the rice veggie mix; the eggs are preboiled and
6 certified off site, so we don't even boil the eggs on the
7 kosher meal. And, so, that's the whole point. The system is
8 designed to be -- there is no cooking of meat there; there is
9 nothing. And, so, it gets in under a lower standard of, like,
10 a kosher restaurant or a manufacturing plant, where they do
11 have inspections.

12 But the issue on those inspections that we haven't
13 talked about is the fact that we've got -- and I think
14 plaintiff's counsel has already stated this. I believe he said
15 there is Reform, Conservative, Orthodox. I suspect -- I could
16 be wrong -- I suspect this case is going to be a battle of
17 theologies, a battle of sects, a battle of people saying, "It's
18 our way, not your way," "No, it's our way, not your way."

19 And, so, Rabbi Moskowitz (phonetic), who provided his
20 declaration in support of our motion for leave to file
21 surreply, has testified that the most inclusive standard for
22 kosher food is the Orthodox Union standard. And that is the
23 standard on which the common fare menu is predicated. It
24 sounds to me -- and perhaps discovery will take this in a
25 different direction -- it sounds to me that where plaintiffs

1 are most critical is on the issue of inspections.

2 And I have to say that I believe the evidence will
3 show -- we can let discovery do this -- that there are other
4 prisons out there -- I will represent to this Court that I
5 spoke to a representative of the Colorado prison this week.
6 And that was the case -- the famous -- I believe it was the --
7 I want to say the beer case, but I'm going to mispronounce
8 that -- wherein about 15 years ago they got in a lot of trouble
9 for not providing kosher meals. They are providing kosher
10 meals; there are, I believe, four inspections per year. There
11 is no continuous, ongoing rabbinic supervision as is called for
12 here.

13 So, Nevada isn't trying something new where it puts
14 them on the moon or on Mars. It seems that the suggestion is
15 that Nevada is being radical here. And it's not. But I
16 believe the evidence will show that within the prison setting
17 the inspections are appropriate.

18 Surprise random inspections. Now, there's questions
19 about, well, how much of a surprise can it be? The guy is at
20 the gatehouse. We can work those issues out.

21 We have also got stronger protocols in place, like
22 video cameras, that are going to be phased in. They're not
23 there now, but they're going to be phased in. And, so, when
24 someone says, "I'm doing a random spot inspection, Tuesday
25 night, 3:00 a.m. to 5:00 a.m.; pull it." "Last September 24th,

1 7:00 p.m. to 9:00 p.m.; pull that tape." And, so, they're able
2 to pull random spot checks, which statistics does all the time
3 in manufacturing, and they can create, through the assurances
4 of statistics and random checking, a reliable picture as to
5 whether or not there are deviations.

6 There will also be testimony throughout this case,
7 I'm sure, about what does kashrut forgive. If --

8 **THE COURT:** Well, I think Mr. Hafter has said that he
9 doesn't necessarily need to have someone supervising 24/7 so
10 long as local counsel of rabbis is used that -- and he defers
11 to them to determine what would be the, you know, I guess,
12 least expensive way to still satisfy themselves that the prison
13 system is providing the kosher meals. And I think that they're
14 not going to require -- well, I'm not going to speak for them,
15 just as Mr. Hafter didn't want to speak for them -- maybe they
16 aren't going to require 24/7, but I think there was kind of --
17 the door was open there by Mr. Hafter that perhaps his counsel
18 would allow for just spot checks and, like you said, with video
19 cameras. That's a great idea.

20 **MR. GEDDES:** Your Honor, thank you. And I don't mean
21 to misspeak. And if I misspoke and Mr. Hafter clarified his
22 statement, then I apologize.

23 The issue becomes -- and I don't know how to say this
24 without -- perhaps it sounds a bit crass, but I'm just going to
25 say it, your Honor, and I mean it in all respect; I don't mean

1 to be rude. I think what's going on here is you've got
2 different religious political groups vying for and jockeying
3 for power to make their insistence upon an institution. "It's
4 not going to be those guys; why don't you work with us; why
5 don't you work with us?" And I don't think that's fair.

6 I think what the Court's going to ultimately have to
7 determine is: What is constitutionally adequate? It may have
8 to weigh in on issues of this sect, that sect. It's going to
9 be very tricky. But I don't think that evidence before this
10 Court that Nevada Department of Corrections has its preferences
11 to go in this direction -- we're not thumbing our nose at
12 anyone else; we're saying this is our discretion. We're the
13 executive branch. This is our job, our duty, to uphold the
14 public interest, and this is how we want to go.

15 And in this regard, the NDOC has satisfied that they
16 are providing for the needs of kashrut, and they are
17 accommodating inmates who have a need, a religious dietary
18 need, for kosher meals, and they are also balancing the needs
19 and saving the taxpayers what's projected to be \$1.5 million.
20 It doesn't mean that we think these guys are not a nice bunch
21 of guys. It's just that there is room for debate.

22 There is orthodoxy; there is heterodoxy. These are
23 things that I am learning now, that I know very little about.
24 And I suspect that if you got a bunch of different sects
25 together and different -- you know, Reform, Conservative, and

1 Orthodox Jews together, they would respectfully disagree, and
2 they probably would have fascinating philosophical discussions.
3 But the question that we have to keep coming back to is, are
4 you --

5 **THE COURT:** Well, the only plaintiff we have here
6 right now is Mr. Ackerman.

7 **MR. GEDDES:** Thank you. And, so, when I say
8 "plaintiffs" -- and that's been tricky, because I know that
9 there is a proposed class --

10 **THE COURT:** Right, there is a motion for
11 certification on, yeah.

12 **MR. GEDDES:** Right. Thank you.

13 I'll try and move it along, your Honor, because I
14 appreciate the value of the Court's time and the parties' time.
15 But I think ultimately this is going to come down to a
16 religious, political ideology, you know, trial, and it's going
17 to be interesting to see how we can resolve that.

18 Now, I do want to just mention very briefly Gary
19 Friedman. It's my opinion that he's been maligned in this
20 Court, but this is a courtroom, and, you know, people are
21 entitled to their opinion. Gary Friedman never said, "I got my
22 letter. Everyone look at my letter. This is my claim to
23 endorsement." Gary Friedman has over 20 years -- in fact, Gary
24 Friedman helped draft RLUIPA. He is a frequent speaker. I am
25 confident, having qualified experts before, I am confident

1 under the federal rules he will qualify as an expert, and I
2 agree with your Honor; this may come down to a question of
3 weight. But as to the legal qualification of an expert, he is
4 qualified on so many other grounds other than a letter. His
5 letter was just a letter saying, "I've got this endorsement
6 letter." That wasn't the sole basis of his expertise. If it
7 were, that would be very flimsy indeed.

8 Now, I will say, your Honor, he is in a bit of a
9 work -- a workup right now, because he is now having -- because
10 people have gone to this rabbinical board and, for whatever
11 reason, represented things to be one way, he's had to now
12 explain to him what really has gone on.

13 So, you know, the motion that was previously filed
14 about, you know, we can all disagree -- and I am -- in my --
15 just so the Court knows, in my motion for an order to show
16 cause, I did not ask for sanctions. I did not ask for
17 disqualification. I do appreciate the fact that there is a
18 history between Gary Friedman and plaintiff's counsel's people.
19 I'm not saying plaintiff's counsel, per se, but people aligned
20 behind the scenes, and I think -- and I could be wrong -- but I
21 think in the beginning they were trying to move things along
22 and work things out. Somewhere along the lines it changed, and
23 all I was asking, in a very soft way, was: Can we not try --
24 can we try not to interfere with other experts? I'm not
25 denying that there is historical ties between them, and,

1 because of that, I am asking it in a very gentle way.

2 Now, I believe that the evidence is going to show --
3 and Gary will have his day in court, and that's fine -- that
4 he's qualified and that while one sect may want to tear him to
5 shreds, there are going to be other people who say, no, I rely
6 on this guy. In fact, the Aleph Institute retained Gary in at
7 least two lawsuits. He has a respected opinion. So, because
8 he's not a rabbi does not defeat his ability to perform kosher
9 supervision. Now, I do not doubt that there's disagreement on
10 the point from some camps, but there is agreement on that from
11 others.

12 I mentioned the Colorado plan, and I believe that our
13 plan -- and their plan has been in effect 15 years,
14 thereabouts, and they have informed me -- at least the woman I
15 spoke with, they're not aware that -- and she could be wrong;
16 she's not a lawyer -- but she is not aware that that is
17 currently being challenged. I empathize with Colorado, because
18 I don't want to bring them into this lawsuit and give anyone
19 ideas to sue them, and I think that, you know, that's probably
20 why I haven't gotten a call back in a few days from them. I
21 think they need to vet it through their lawyers, because I've
22 done -- I work in the tobacco litigation, and we work with
23 other states, and, you know, states don't -- they respect the
24 fact that we don't want to complicate things.

25 And, so, we've heard a little bit about California

1 rabbi standards. I think all we're really knowing now is we
2 don't know. And if we don't know now, there is no basis to
3 issue a preliminary injunction. There's ideas --

4 **THE COURT:** Well, actually, Ninth Circuit says in the
5 *Alliance* case that if there are serious questions going to the
6 merits in a hardship balance it tips towards the plaintiff.
7 I'm sure it would be a hardship if, in fact, it's not a kosher
8 meal, that that can support the issuance of an injunction, and
9 that's why I'm inclined to grant the injunction. My only
10 question is whether I should grant it only as to Mr. Ackerman
11 at this point or to all of the inmates that are currently
12 receiving kosher meals.

13 **MR. GEDDES:** Well, the challenge that I have with
14 that, your Honor, is that, based on the evidence that's been
15 presented to this Court, their motion, talked about what they
16 thought the menu would be, and they were completely wrong.
17 They said, "They're going to cook milk and meat together and
18 contaminate utensils." If this Court is sincerely considering
19 or seriously considering granting an injunction, which is a
20 tremendous hardship on the State of Nevada, we would
21 respectfully request that the Court do empanel an evidentiary
22 hearing; because I think that this point I'm outgunned on what
23 I can present to the Court as Jewish authority and Jewish law.
24 And I believe, if we had Rabbi Moskowitz and Gary Friedman
25 sworn in, I believe this Court would have a more balanced view,

1 that the current kosher menu is indeed kosher. And the
2 evidence that's been provided is nothing more than knocking
3 what we have. I'm not sure that, you know, raising in a reply
4 brief that, "Well, we don't like this guy" -- that is not a
5 full picture of the evidence.

6 And, so, we're not afraid. We're not afraid to bring
7 in the evidence, and if this Court is considering that, we
8 strongly -- we'd strongly request, we implore the Court, to let
9 us have our ecclesiastical day in court, because if this
10 Court's --

11 **THE COURT:** I'm not satisfied an evidentiary hearing
12 would tell me any different than what I've already heard, only
13 it would be under oath. Serious questions still would remain.
14 I think that if any one of you had an actual case or a
15 standard -- I mean, this is new for everyone, and I understand
16 that, but --

17 **MR. GEDDES:** Well, I'd be happy to provide
18 supplemental briefs on it. I just think that they certainly
19 have not met their burden. Their opening brief --

20 **THE COURT:** You can certainly file a motion to
21 reconsider the preliminary injunction or to modify the
22 preliminary injunction.

23 **MR. GEDDES:** Okay. Well, then, let me go to the
24 PLRA, which requires -- we have, obviously, the PLRA that -- or
25 the RLUIPA -- that says least restrictive means, but we also

1 now have the PLRA that says any remedy that the Court
2 fashions --

3 **THE COURT:** Must be narrowly drawn --

4 **MR. GEDDES:** -- has to be the least restrictive
5 scope.

6 **THE COURT:** -- which is why I was trying to keep it
7 just to either Mr. Ackerman or just to the kosher inmates and
8 not to all of the other inmates that have a dietary need.

9 **MR. GEDDES:** Okay.

10 The evidence -- and I just say this for the record.
11 The evidence that this Court has received has been testimony by
12 counsel, which is not competent evidence before the Court. I
13 think as far as the evidence that's been presented to the
14 Court, what the Nevada Department of Corrections has presented
15 in the form of certified kosher menus, which means that the
16 manufacturer has used a reliable symbol and certified that this
17 food, wherever the rabbinical authority came from on the
18 manufacturer's side, has certified to be kosher to the Orthodox
19 Union standard. There is no evidence that the food
20 ingredients -- there has been no evidence by the plaintiffs
21 that that food is not certified or is not kosher.

22 And the evidence that's been provided to this Court
23 talks about many safeguard features. In every one of these
24 prisons there is a separate kitchen, lockable door, lockable
25 area; Colorado doesn't even have that. So, there is no risk of

1 contamination, because the kosher room is separate over there;
2 many of them have their own kosher sinks; they've been
3 koshered, they've been locked. And for the prisons that do not
4 have a separate sink area, they follow what Colorado does. And
5 that is they have kosher --

6 **THE COURT:** So, there are two separate sections, one
7 for the meat and one for the dairy? Or is it just the one part
8 of the kitchen where both are?

9 **MR. GEDDES:** For the preparation of the food there is
10 no preparing of meat. None. There is no preparing of dairy.
11 None. The only dairy on the menu is milk, which is factory
12 sealed from the manufacturer, and that's given directly to the
13 inmate. The meat is factory sealed, certified kosher, and
14 given to the inmate. So, we don't get involved in dairy; I
15 mean, we don't cook anything. The closest anything comes to
16 cooking, which is not cooking, are the rice tofu dishes. Those
17 are already part -- those are already precooked, and they're
18 simply reconstituted.

19 But the preparation of the food that's opened is done
20 in a separate locked room, and that is, it has a dedicated
21 kosher staff, meaning you're not going to get "Joe" to work in
22 the kosher, he's going to pick up his ladle and come over here
23 to the main line and pick up some spaghetti sauce. They're
24 dedicated staff, separated and apart. This has been carefully,
25 carefully designed.

1 As I said, Colorado has been doing this for 15 years.
2 They have kosher designated bus tubs, which are not stacked,
3 and they are inserted in the sinks; and utensils, which are
4 marked "kosher" and they're clearly identifiable and they are
5 designated only for kosher food, are washed, they're walked
6 back into the locking room, and they're put in a locking
7 cabinet.

8 The plaintiffs also complained, "Well, you know,
9 we've got trays that might be contaminated because the main" --
10 guess what? All disposable containers, Styrofoam and the like,
11 that's safe for inmates when they don't burn and it becomes a
12 weapon.

13 So, there is no reason, there is no competent
14 evidence before the Court, that shows that there are serious
15 questions about cross-contamination. The only issue that they
16 seem to be bearing down on, that we've focused on, is the need
17 for continuous, ongoing rabbinic supervision. And that is a
18 hotly contested matter.

19 So, rather than point out that our kosher symbols
20 aren't reliable; they are. Rather than point out that we don't
21 have separate kitchens; we do. They are creating a
22 hypothetical parade of horrors that might happen.

23 I have case law. And the case law talks --

24 **THE COURT:** Was there any rabbinical supervision
25 before? Or was that not necessary because of the current plan

1 everything is packaged?

2 **MR. GEDDES:** My understanding is we've never had
3 continuous rabbinic supervision. The current kosher meals, to
4 my understanding, use the, as a staple of it, a -- what the
5 army uses, the meals ready to eat. But the cutting boards, if
6 there is cutting of vegetables, if there is preparing in that,
7 it's kosher, kosher designated, locked.

8 And the State of Nevada has been very, very careful.
9 We hear complaints that, "What took them so long?" You know
10 what? We're vetting the process.

11 **THE COURT:** And this is what Chaplain Friedman has
12 been doing?

13 **MR. GEDDES:** Yes. He's been doing that. And to his
14 credit, there was questions about his limitations; "Oh, he
15 can't -- he's just a -- he's not qualified." He does not live
16 in a vacuum. He has said in his declaration, and he's told me
17 many times, "I'll pick up the phone." He won't hesitate to
18 call the president of the Orthodox Union to ask a question
19 about, you know, in our -- I want to say esoteric area of this
20 or that. He is very dialed in. And he has spent a lot of time
21 working on this model. And to some degree -- and I haven't --
22 I don't have the evidence in front of me -- I am told that
23 there are other states that, you know, use a lesser version of
24 what we're doing.

25 But this is a well-thought-out plan, and there is no

1 competent evidence before the Court. All we have is
2 supposition. And the granting of a preliminary injunction, we
3 believe, I suspect, will cause a great number of people to try
4 and fit into that court's order. So, it would defeat the idea
5 of limiting it to a class of one.

6 Now, you know, I can take that to my client, because
7 I want to give my client as many options as possible, the idea
8 that if you kept Inmate Ackerman on a Travers Greene diet -- by
9 the way, we've heard about Travers Greene. By and large,
10 that's what the current kosher is. It was derived from the
11 Travers Greene model. And that's what's costing the State of
12 Nevada, dollar for dollar, \$1.5 million more.

13 If this Court were seriously going to entertain
14 granting some form of relief to Ackerman, I would be foolish
15 not to take the idea back to my client that, you know, you put
16 him on a Travers Greene menu, and stop the harm, and have that
17 be not the granting of a preliminary injunction, but a
18 modification of one particular inmate, and then throughout the
19 life of this case we can finally get to a point at the end of
20 it and litigate it, but we really are worried about the
21 bandwagon effect, and that's what's costing so much.

22 **(Pause)**

23 We've heard a little bit about Rabbi Moskowitz.
24 Rabbi Moskowitz was very hard for me to come by. I tried very
25 hard to get a hold of him in the beginning. He's been very

1 busy in California. It's only recent that he's come back like
2 a boomerang and he's expressed a willingness to help. And, so,
3 I believe that if this Court in any way is accepting a lesser
4 opinion of him than he deserves, I would request, "Why not
5 bring these people in?" This Court can weigh their credibility
6 and be impressed or not impressed as to whether or not they
7 seem to impart religious authority and know-how to the point
8 where it may be a very narrow issue.

9 **THE COURT:** Okay. Well, currently the implementation
10 of the plan is scheduled for February 21st.

11 **MR. GEDDES:** That is correct, your Honor.

12 **THE COURT:** So, are you offering, then, to postpone
13 the implementation in order for us to have a preliminary
14 hearing, or did you want to have a preliminary hearing on the
15 20th? Or --

16 **MR. GEDDES:** Thank you, your Honor.

17 **THE COURT:** -- do I issue a preliminary injunction
18 and then -- you tell me.

19 **MR. GEDDES:** I don't have authority to do that.

20 **THE COURT:** Okay.

21 **MR. GEDDES:** I'm happy to coordinate any idea that
22 the Court has. My sense of things is -- and I can't reveal
23 attorney-client communications, so without doing so, I will say
24 to the Court I'll represent that what my sense of things is,
25 there is a great urgency. We already are short budgeted. Time

1 is of the essence. They want to roll this out. They want to
2 get going. And I suspect -- I could be wrong -- but I suspect
3 if I went back to my client with the idea that we just not roll
4 out on the 21st, if that meant delaying it for some significant
5 time, I think that I would probably get yelled at. Because
6 there has been a lot of planning, a lot of thought.

7 There's food that's been ordered. There are --
8 there's equipment that -- I went to a koshering yesterday at
9 Northern Nevada Correctional Center. We went from four
10 prisons; we added two more. We went to six. I watched Rabbi
11 Brontein (phonetic) perform koshering. There is a stainless
12 steel table in wrap. It's brand new. We spent a lot of money
13 buying new sinks, just to remove all doubt that it isn't
14 kosher. We've got stainless steel tables. We've got carts
15 that we've made, stainless steel lockable carts. We built out
16 a cage in Lovelock.

17 Gary Friedman -- there was a question -- there was a
18 point that was made that is inaccurate. The question was, "Ah,
19 he doesn't have any authority; this is prison." That's
20 absolutely false. They -- the prison has looked at him as
21 their consultant, their expert, and what he's asked for he's
22 gotten. And I can produce evidence of that.

23 In fact, when I went to Lovelock, Gary Friedman saw
24 that there was no dedicated kitchen area. Gary says, "You need
25 a dedicated kitchen area." And they said, "Fine. Well, we're

1 limited in space." And Gary walked around and said, "You know
2 what? Right here, in this space, build a cage. Build a cage
3 and lock it." And that's what we did. And that's a kosher
4 room now. And inside that there's room for tables and food
5 preparation and the locking cabinet. So, the notion that Gary
6 Friedman cannot impart a great influence on getting the design
7 of the prison to comply with the Orthodox Union standards is a
8 misimpression.

9 Let me just wrap this up, because I know that I've
10 taken quite a long time here.

11 I do want to talk, if I may, your Honor -- just
12 because the issue has been brought up, I would like to talk a
13 little bit about Inmate Ackerman. It is a false statement to
14 say that the State of Nevada has not produced evidence
15 concerning his misdeeds in prison. I'm not talking about what
16 got him to prison; I'm talking about the things he did in
17 prison.

18 I will not present this to the Court, because it's
19 unfair. I want to give plaintiff's counsel an opportunity to
20 see this document. I have a document. It's a new declaration
21 from Associate Warden Lisa Walsh. And she confirms that there
22 is still bad blood between Mr. Ackerman. We'll get into that
23 later, but I want to say, without disclosing confidential
24 inmate information, that one cannot assume that the person who
25 is the separatee, or the enemy, is the person for whom the

1 disciplinary charge was dropped.

2 In fact, we will take plaintiff's suggestion, and we
3 would request an in-camera, in-chamber discussion where we can
4 discuss who this person is and what the crime is -- and what
5 the problem is. The problem is, if we did this in open court,
6 the identity of what occurred would likely reveal who this
7 person is. There are grave, grave concerns about Inmate
8 Ackerman coming back to the prison.

9 I'll say no more on that, but we have evidence, and I
10 will represent that to the Court. And we have already produced
11 evidence in the form of the classification records and in the
12 disciplinary charges, which talked about what the incidents
13 were.

14 And I just want to say one more thing on this point.
15 I hear this a lot from inmates, all the time. Just because a
16 charge is dismissed, or just because a charge is pled down, it
17 does not -- it is not the equivalent of exoneration. In this
18 case, the reason why -- and this is in the declaration of Steve
19 Suey (phonetic). He listened to the disciplinary tape, and I
20 am happy to make copies and provide that to the Court. I don't
21 think that's necessary, but we're not hiding anything. The
22 reason why they did not convict him of the charge of an assault
23 against another -- trying to arrange for an assault of the
24 other inmate is, as he said in his declaration, when the
25 investigator went to them to try and get them to corroborate

1 this, they were all so mad at him -- for lots of reasons they
2 were just mad at him -- that he said, you know, "They're angry.
3 I can't corroborate; this doesn't meet the prong test." It
4 doesn't mean he was exonerated. And we're happy to provide
5 evidence of that.

6 Moving on to the other issues, we did talk about
7 confusing the proof with the likelihood of success, you know,
8 regarding the balance of equities. I would implore the Court
9 not to simply look at the equities for the plaintiffs in
10 religion, but also the State of Nevada and the -- we agree with
11 the Court; a lot of the case law that the plaintiffs have cited
12 is not an issue of provide or don't provide, but it's to switch
13 the program. And we've provided competent evidence to the
14 Court that the current -- I'm sorry -- the common fare menu,
15 both with Rabbi Moskowitz, who is a rabbi, and Gary Friedman,
16 that the common fare menu is kosher.

17 And I think this Court may want to make an inquiry,
18 because I think there is a term that's been bandied about, and
19 we haven't really drilled down on it, and the term is
20 "certification." I am not an expert, but my understanding,
21 right or wrong, is that the term "certification" means
22 something along the lines of: You're a restaurant; you got a
23 letter from a rabbinical authority, from a -- or some other
24 agency that certifies kosher restaurants; and you got a letter,
25 and you hang it up, and that's been certified. I would ask,

1 respectfully, plaintiffs to identify for us any prison in the
2 country that has a certification letter. They may be hard
3 pressed to come up with it. So the model of getting a
4 certification letter or a certification may not be one that
5 applies to prison, and it certainly doesn't evidence that
6 something is not kosher.

7 The suggestion that there be an Orthodox Council of
8 Rabbis to dictate to the prison, all that really is, is: Your
9 Honor, please favor our guys; let our guys dictate to what goes
10 on there. And I don't think that's fair. I think what needs
11 to happen is there needs to be a trial, the Court needs to hear
12 from many rounded opinions, and the Court can come to its own
13 conclusion.

14 As I said earlier, Rabbi Moskowitz has testified
15 under oath in his declaration that the Orthodox Union standard
16 is the most inclusive, and that's what the prisons want. As
17 far as -- we talked about the letter and he's not going out
18 there -- Gary Friedman is not going out there as an agent of
19 anyone. He's his own man. He's not saying I'm out here for
20 the Washington Rabbinical folks.

21 I mentioned that, you know, he's very well versed not
22 only in kosher but inmate legal issues. He assisted in the
23 drafting of our lupa (phonetic), and Rabbi Moskowitz works for
24 the California prisons. So there are other considerations than
25 just kosher. It's kosher and then prisons.

1 With respect to the purchases that inmate Ackerman
2 made there were statements, words to the effect that, you know,
3 you can't ding them for that, that's not him. I have to say
4 that the evidence we have produced in the declaration of Dawn
5 Rosenberg clearly establishes that there is a computerized
6 system, inmates have a card, they purchase it, they check the
7 books, they debit the account. There is no monkeying around,
8 Joe isn't buying, walking in with Larry's card. That's not
9 happening. This is prison. They are very good at what they
10 do. They are experts at prison security.

11 And so we know, we know that he purchased these
12 items. Again, at a later time I will produce the declaration
13 of Lisa Walsh (phonetic) where she confronted Mr. Ackerman on
14 this. And he stated to her: I wasn't breaking that rule; I
15 was breaking a different rule. I was giving it away to other
16 people. As the declaration explains, it is against the
17 administrative regulations for inmates to trade, barter or give
18 away products. There are so many problems with that. Inmates
19 could be pressured. When they do cell checks and they shake
20 down you have a radio assigned to the wrong guy, they can
21 assume, wow, did you pressure that guy to give it to you? It's
22 very, very controlled in prison. Everyone wants what another
23 inmate doesn't.

24 So when inmate Ackerman admits, hey man, I'm just
25 giving it to someone else, he is admitting that he is violating

1 the prison penal code. And if he's admitting that he's doing
2 that and he's also creating an appearance of impropriety with
3 respect to being kosher, we will produce evidence -- in fact,
4 it's in this declaration --

5 **THE COURT:** What about the fact he hasn't done it
6 since March of 2011?

7 **MR. GEDDES:** Thank you. That's a very good question.
8 Since -- I believe the date was given in February,
9 February 24th. I think that's incorrect. We produced evidence
10 that it went further. There is no doubt, there is no doubt in
11 our mind that there came a time when inmate Ackerman knew he
12 was going to be the poster child for a big cause, a big class
13 action. How do we know that? There are people who tell us
14 that he brags to them, ah, don't you know who I am? I'm the
15 guy who single handedly is getting rid of this or that. So of
16 course he knows he's going to be watched.

17 When do we look at what he does? We look at what he
18 does when he doesn't think it matters or when he doesn't think
19 people are looking. It's the little things that people does.
20 He knows he couldn't get away with it. Plus, in the
21 declaration of Lisa Walsh she confronted him and said: I'm
22 warning you, don't do that. So he knew he was under the radar.

23 So the idea that an inmate is saying it's not mine, I
24 was giving it to someone else; well, we know two things: We
25 know that you're breaking the rule; we know you ordered it.

1 And so, you know, one inmate advised Lisa Walsh. And we don't
2 know if it's figurative or literal. He would always preach to
3 us with a ham sandwich hanging out of his mouth. There are
4 serious concerns about his sincerity.

5 Now, he may want to rehabilitate. It seems humorous,
6 I admit. When I heard that and it was written down, it seemed
7 funny. But the point is, is that just yesterday Lisa Walsh did
8 some investigation. And there are current animosities with
9 others in the religious NNCC group. We can get all that in
10 discovery. But I'm just saying --

11 **MR. HAFTER:** Your Honor, that's not part of the
12 record of this case. I've been kind of patient, but I've got
13 to object. I mean --

14 **THE COURT:** The ham sandwich?

15 **MR. HAFTER:** Well, all of that. I mean this
16 declaration of Lisa Walsh, all this, it's not evidence in this
17 case. You know, I've already complained that they've
18 sandbagged us by providing evidence late. And now at the
19 hearing they're bringing up stuff that we have no idea what
20 they're talking about.

21 **MR. GEDDES:** I believe the issue was raised that we
22 don't have evidence. We've already provided evidence. I'm
23 just -- and the issue was raised that this person is being
24 dinged.

25 I believe it's fair game to address these points in

1 rebuttal. But I'll move on, your Honor. I'll move on. We
2 believe it goes to sincerity. And again, it doesn't mean
3 someone is exonerated because they decided they didn't want to
4 move on with it.

5 The issue about the ultra viresism, I'm happy this was
6 brought up. Plaintiffs are certainly free to file an amended
7 complaint. I might save them some trouble.

8 I'm holding in my hand -- and, you know, you can
9 claim this is new evidence; I'm just trying to help. Please
10 review administrative regulation NDOC AR100. NDOC AR 100.01,
11 Development of Administrative Regulations. Subsection 6, a
12 draft regulation which has been signed by the director shall
13 become a temporary regulation with a force of policy until the
14 next meeting of the board of prison commissioners.

15 Now, they did address this in passing in their
16 briefs. And they said: Well, look what happened. You got a
17 December date and this wasn't -- notice wasn't given back in
18 November. But if they look carefully, it works the other
19 direction. A December date says will be effective way out here
20 in February. That's more than 30 days' notice.

21 So I believe if that amended complaint is filed, that
22 is subject to dismissal; it would be a futile claim. I would
23 request that the Court invite briefing on a motion to amend
24 rather than just allowing them to amend, because we can nip it
25 in the bud without actually amended on that --

1 **THE COURT:** I have told Mr. Hafter he can file the
2 motion for leave to amend, and you can file your response.

3 **MR. GEDDES:** Thank you. And so I believe that with
4 retaliation we agree with this Court. We believe we've
5 established competent evidence. This is a classification
6 decision. As this Court is well aware, dealing with inmate
7 litigation, inmates do not have a liberty interest in the local
8 of their confinement, they cannot be retaliated against, they
9 cannot be transferred for unconstitutional conditions. Fair
10 enough. But we have met our burden to show -- and this is
11 critical, your Honor; I really want to focus on this.

12 There is this claim that in June filed a lawsuit;
13 man, he was transferred right away after that. That's
14 incorrect. The disciplinary proceedings that resulted in his
15 transfer had roots in March, March of 2011, many months before
16 a lawsuit was filed. There is no nexus, there's no logical
17 conclusion that uh-oh, he filed a lawsuit; let's start trumped
18 up charges; this is what I hear. We hear that all the time.
19 That's simply not true. These are professionals. There was an
20 investigation done regarding a very serious allegation. In the
21 prison when they don't take these allegations seriously, they
22 get sued for failure to protect inmates. And so I believe that
23 the evidence will show all this if we have to go down all these
24 roads. But retaliation is not going to hold up.

25 And finally, your Honor, I would just say that I

1 think we've answered all -- we've answered all of Plaintiffs'
2 questions. We may not have hit all your questions. The time
3 is short. So I would respectfully urge and implore the Court
4 to allow us to further brief or have a hearing with experts
5 before it would grant preliminary injunction; that is one
6 inmate, and they're all in and the costs will go up.

7 And so I ask the Court to look at the evidence that's
8 been provided in the briefs, and I believe the Court will find
9 there is no compelling evidence, there's no substantial
10 evidence, there's no evidence at all; there's just testimony
11 and talking about -- you know, and Rule 72 requires points and
12 authorities, your Honor. And there's case law that says, you
13 know, not just points and authorities that says points and
14 authorities. Points and authorities that track -- the
15 authorities track your points. And I don't believe we have
16 that nor do we have competent evidence.

17 And so in conclusion, your Honor, the balance of the
18 evidence, competent evidence before this Court, there are
19 separate kitchens, all those protocols, and the food is
20 certified, it's sealed. We believe that we've more than
21 rebutted their burden to establish that there is imminent harm
22 facing their clients. Thank you, your Honor.

23 **THE COURT:** Thank you. Mr. Hafter?

24 **MR. HAFTER:** Thank you, your Honor. In order to
25 ensure the kosher status of any commissary there's a

1 fundamental policy universally that the oversight and
2 responsibility of the kosher venue be certified by a reputable
3 rabbi or a recognized certifying agency. The supervision
4 entails everything from the raw materials to the finished
5 product ready for consumption or requires the ongoing oversight
6 (quote/unquote).

7 Document 53-1 at Page 4, a letter from the head
8 Kashrus administrator of the largest certifying agency from the
9 Western United States KSA, was provided to this Court,
10 specifically related to this case. I think that's pretty clear
11 and convincing evidence that we need ongoing oversight, and we
12 need a certification from a reputable agency.

13 I think also the fact that we provided testimony and
14 declarations from a rabbi in another case that a U.S. District
15 Court relied on as appropriate authority and evidence as to
16 what the kosher standards are, namely, Rabbi Grossman, I think
17 that that goes to meet our burden. We have evidence that
18 suggests -- and we're not talking about the separation of
19 utensils. We're not talking -- we're talking about the lack of
20 a certification and a lack of ongoing supervision. Those are
21 the issues in this case. We have evidence here.

22 And the funny part is he says: Well, we're going to
23 go to the Orthodox Union standard as the most inclusive. We're
24 fine with that. We've got no problems. However, has he ever
25 offered to suggest that his new California rabbi will meet the

1 Orthodox Union standard to certify this program? No, he can't
2 because they won't. Bring the Orthodox Union in here and
3 certify it and we're done. What's the hard part? We don't
4 have a problem with that. But they won't.

5 And so, your Honor, there is a serious question. But
6 let me address a couple of issues. Thank God for technology,
7 because I have a question to our exhaustion question; I have an
8 answer. *Thomas versus Schwarzenegger* (phonetic), 2011 Westlaw
9 4501002, an Eastern District California case in 2001, cites
10 *Gates v Cook*, 376 F.3d 323, which is a Fifth Circuit opinion
11 from 2004. And I realize it's not Ninth Circuit law, but under
12 a quick Westlaw search sitting at counsel [sic] during argument
13 I think it's pretty good. And the Court, *Thomas versus*
14 *Schwarzenegger*, said, "The fact that one class member has
15 exhausted administrative remedies is sufficient to satisfy the
16 PLRA's exhaustion requirement for another member of the class."

17 So I don't think we have to ask each and every member
18 of this class, which we hope you'll certify, to first exhaust
19 before they opt into the class. The fact that Mr. Ackerman has
20 exhausted is good enough.

21 Now, are we going to limit the injunction to just
22 Mr. Ackerman or to all inmates receiving the kosher meal
23 currently? The only thing that would happen if you said we're
24 going to limit it to Mr. Ackerman is I'm going to start filing
25 numerous more lawsuits on behalf of all the other prisoners

1 that were in my office with emergency motions for a temporary
2 restraining order or preliminary injunction based on the same
3 exact issues why it's issued against Howard Ackerman. And it's
4 just going to drive up the costs; it's going to drive up the
5 use of judicial resources.

6 The point is, is this is the prime example of a class
7 where this Court should act to protect all the interests of the
8 members. If it finds that there is a substantial burden on
9 Mr. Ackerman -- or questions that lean towards proving a
10 substantial burden of Mr. Ackerman's right to free exercise
11 through use of kosher meals, then everyone who is currently
12 obtaining kosher meals, their right to free exercise is equally
13 burdened. And so, therefore, they're entitled to an injunction
14 as well.

15 So we're fine limiting it to just people on the
16 kosher meals plan, but it needs to be all the people who want
17 to receive kosher food.

18 Now, there's been a discussion that I've been having
19 with myself and a couple of other people about this equal
20 protection. I didn't want to raise it because I really am not
21 sure if I'm chasing windmills or not. But it was raised.
22 There is evidence in the record that Mr. Ackerman has filed
23 grievances that his kosher meal is not the same as Traver
24 Greene's (phonetic) kosher meals, that the current kosher meal
25 plan for everyone else is not the same as Mr. Greene's. Is

1 that an equal protection violation? It may be.

2 But worse, what happens if they implement the common
3 fare menu and they're still giving Mr. Greene's kosher meals
4 under the settlement agreement that they have? Now there's
5 absolutely an equal protection argument. And so all that we
6 would be doing is on behalf of Mr. Ackerman and every other
7 Jewish inmate who wants kosher meals is creating even more
8 causes of action to engage in further litigation if we don't
9 stop this.

10 When an attorney -- I want to hit one more point
11 quickly. I spent the first half of my career as an attorney
12 not litigating. I didn't even know what a courtroom looked
13 like. And there were a couple of litigators. There's a
14 gentleman up in Helene (phonetic) -- right now it's something
15 else, Holland & Hart in Reno, a very skilled litigator. And he
16 used to -- I'd say, "How do you do this?" And he would say "My
17 job as a litigator is to become an expert on my subject
18 material that I'm going to argue that day, and then when I go
19 home forget it and learn what I need to know for the next day.

20 There are attorneys who know more about medicine than
21 physicians. The fact that I know about Kashrus doesn't mean
22 that I'm testifying. It means I'm doing my job as an advocate
23 for my client. I take a little bit of offense to the arguments
24 that I can't sit here and advocate for my client through
25 argument, because I know very well that if push comes to shove

1 and when the time comes -- it's not if, when -- I'm going to
2 have to back up everything I'm saying with credible evidence
3 for this Court. That's being an advocate and an attorney.
4 It's not testifying. And so I have a hard time without
5 objection.

6 **THE COURT:** I see it as no different as Mr. Geddes
7 testifying about what the inside of the kitchen looks like and
8 what has been purchased and so forth. And you all have
9 experience and I hold you to the utmost standard as officers of
10 the Court that you are telling me the truth without the
11 affidavit that would otherwise need to be filed at this point.

12 You know, we're at the preliminary injunction stage.
13 This is not a bench trial or a jury trial or whatnot. In that
14 case then, of course, I would require you to have evidence and
15 not to be able to argue anything unless it was based on
16 evidence that had already been submitted. But at this point I
17 think it's quicker since we're looking at a February 21st
18 implementation to go ahead and consider some of the
19 clarifications provided by counsel that are factual rather than
20 legal just for assistance for the Court in putting this all in
21 the proper context.

22 **MR. HAFTER:** Thank you, your Honor. Just a few more
23 points.

24 He kept arguing that we're going to burden the state
25 if you issue this preliminary injunction. I want to keep it in

1 mind that all we're asking you to do is maintain the status
2 quo. We're not asking you to ask them to do more than what
3 they're currently doing. That's a very important point that I
4 think has not been addressed.

5 **THE COURT:** I think all preliminary injunctions
6 burden the Defendants.

7 **MR. HAFTER:** I want to talk a little bit about
8 Mr. Friedman. I want to make it very clear, even though I
9 think that this will come up again. First of all, I had never
10 seen a motion for order to show cause that it's a soft way of
11 asking. They're pretty heavy handed, but notwithstanding --

12 **THE COURT:** That's before Judge Leen.

13 **MR. GEDDES:** Well, with respect to the weight that
14 you're giving Mr. Friedman's evidence, I just wanted to be
15 clear that I contacted the Va'ad in Seattle. I didn't make
16 things up. I gave them Mr. Friedman's declaration. They wrote
17 that letter based on Mr. Friedman's declaration.

18 And then he said Mr. Friedman doesn't live in a
19 vacuum. You know, he picks up the -- why didn't he call the
20 Va'ad? Why didn't he talk to this organization that he had
21 such a great relationship with for 20 years about what he's
22 doing in Nevada if he really doesn't live in a vacuum? Or
23 better yet, if he has such a relationship with the Orthodox
24 Union that he call up the president. Why not ask the Orthodox
25 Union to certify this program?

1 It is true that many prisons aren't certified kosher.
2 But many prisons recognize that the rules of Kashrus in food
3 preparation are so arduous that it's easier to order in than to
4 make your own food. And so many prisons don't try to do what
5 Nevada is doing. And with respect to Colorado, none of that's
6 in the evidence. And Colorado's practices aren't at issue
7 here, you know. It's Nevada's prelan (phonetic) practices that
8 we're trying to oppose.

9 There's an old joke about two rabbis that are on a
10 desert island, and all of a sudden a third breakout shul
11 synagogue forms. Yes, you get a bunch of rabbis into a room;
12 they're going to disagree. And that's why you have a rabbinic
13 council, your Honor. But they're all Orthodox rabbis. And
14 most of the time they use the Orthodox Union standard or
15 whatever standards mirror that.

16 We're not asking for anything different. The problem
17 is, is the rabbi from California is not an Orthodox rabbi.
18 He's a reformed rabbi. And if they're going to keep saying we
19 need to use the Orthodox Union standard, let's have an Orthodox
20 rabbi proceed with the supervision.

21 Thank you, your Honor.

22 **THE COURT:** Okay. Thank you, Mr. Hafter.

23 **MR. GEDDES:** Your Honor, briefly. The points just
24 raised bring the following to mind. The distinction between
25 opposing counsel talking about Kashrut and me talking about the

1 inside of the cages --

2 **THE COURT:** Oh, my Lord. Okay. Listen, Mr. Geddes.
3 Here's the issue. I need to decide whether I'm going to be
4 granting the preliminary hearing as to only Mr. Ackerman or as
5 to all inmates. You already have heard Mr. Hafter explain to
6 you the different issues that arise that I had thought of in
7 the past that is -- you know, there's the class action request,
8 that is, the class certification request that I need to have
9 further briefing on I believe. But if I am to grant the
10 preliminary injunction only as to Mr. Ackerman, you know I
11 haven't seen the docket; but there are other individual inmates
12 who have already motioned the Court for permission to -- I want
13 to say interfere -- what is the word, intercede? I just forgot
14 what the word is.

15 **MR. HAFTER:** We're fine with "interfere," your Honor.

16 **THE COURT:** In a plea -- to also participate in the
17 case. An so no doubt they would want to file their own
18 lawsuits as well. I think one of them already has a separate
19 lawsuit that's being heard up in northern Nevada. And they
20 will ask for the TRO, as Mr. Ackerman has had, and the evidence
21 will be substantially the same. So, you know, they can assume
22 that it will probably be granted as well. In addition they
23 will have that other additional claim for due process
24 violation.

25 I'm trying to narrow this as much as possible and I'm

1 trying to foresee, which is difficult looking into a crystal
2 ball that I don't have, how this is going to impact the
3 department. It is not my purpose here to impact the department
4 negatively. I'm presented with an issue where I've already
5 said what the standards are under the *Winter* case whether
6 there's a likelihood of success on the merits. I'm not finding
7 that there is. Whether there's a likelihood of irreparable
8 harm in the absence of preliminary relief, I think there is.
9 Whether the balance and equities tip in the favor of the
10 Plaintiff, I think they do; and whether there's an injunction
11 would that be in the public interest. And I believe that that
12 one is kind of a wobbler; it kind of goes both ways.

13 Looking at just the standards of law -- and I'm not
14 sure if there's sufficient basis here for the preliminary
15 injunction, but looking at the *Alliance* case that the Ninth
16 Circuit asked us to look for in balancing the serious questions
17 that I presented in this case. And there are, there are
18 serious questions. This is an issue of first impression.
19 There's not a whole lot of case law that I've -- well, there's
20 no case law on point, first, no case on point. But there are
21 other cases that are similar but not similar enough that I can
22 say unequivocally and very comfortably that I know exactly how
23 this case is going to come out.

24 So there are serious questions, and they go to the
25 merits of the case. Not the factual questions. I'm not

1 talking about whether or not Mr. Ackerman did or didn't eat the
2 kosher food. I mean the legal merits of the case. And looking
3 at the hardship balance it does tip towards the Plaintiff,
4 because if there is not kosher food available -- I mean this is
5 not talking about whether or not my tennis shoes are
6 comfortable. This is about food and sustenance that the person
7 needs.

8 And I already mentioned to be able to, you know,
9 continue to practice the religion. And I think that there
10 is -- the balance does tip in favor of the Plaintiff and it
11 does support an issuance of an injunction, because the other
12 two, when it has irreparable harm and the public interests are
13 also met, if you'll look at that wobbler, I mean there's an
14 interest here, obviously, for all of us to have the Department
15 of Prisons provide for all the inmates as well as for the
16 guards and everybody else to have a safe and a very fair system
17 of justice where the community can be safe and the inmates can
18 still receive all their constitutional liberties and all of us
19 don't have to pay more taxes in order to be able to do that.

20 But clearly, that's the situation we have here is
21 trying to brainstorm what is the best way, the most effective
22 way, to balance all these concerns. There's a change. The
23 kosher menu that we had in the past, the Traver's Green, is no
24 longer going to be provided. The Department has decided to
25 implement this other common fare menu plan that is more

1 economical for everyone.

2 So I have to look at whether or not there's a serious
3 question, and I find that there is. And I am not comfortable
4 denying the motion for a preliminary injunction, so I'm going
5 to grant it. My real issue now is whether to grant it at least
6 to Mr. Ackerman -- and it doesn't bother me if you file more
7 cases. I mean they're either going to be filing the cases and
8 be heard as a class or individually, and they'll probably all
9 consolidate and the judges will ask me to go ahead and receive
10 them since mine is the first case number, and I will.

11 And I have a number of different cases like that
12 where I've kept them together just for purposes of discovery
13 but not for purpose of the trial, or I've kept them together
14 for this, that and the other just to make it judicially
15 economical; and I don't mind doing that. So probably they'll
16 all end up in my courtroom anyway, most likely. If they are
17 filed individually, that would mean you would have to respond
18 to every single one of those; maybe you would just cut and
19 paste it. But I do have a concern with that additional due
20 process issue. I don't want to make it uncomfortable for you.
21 I know you don't have your client in here and you don't have
22 someone here to tell you whether or not you could just
23 implement it to everyone else.

24 And I guess I never heard from you whether my
25 understanding was correct, whether it's just about 100 inmates

1 that are kosher at this point within the state or is there
2 more? Because I hear Ms. -- I see Ms. Rosenberg shaking her
3 head.

4 **MR. GEDDES:** I can give you that exact number or she
5 can give that to you. But, your Honor, in fashioning your
6 remedy -- that seems to be where you're going with this --

7 **THE COURT:** Yes, I want some help.

8 **MR. GEDDES:** And I'm glad you raised that point, and
9 I forgot to mention this. It is not correct -- and I believe
10 that Plaintiffs' counsel has already stated this to the
11 effect -- that a one size fits all. We are giving kosher meals
12 to Messianic Jews who by some account, some people characterize
13 as Christians who want kosher food. So it is not an accurate
14 assessment to say everyone needs to rise to the level of the
15 standard this Court would be assigning to Mr. Ackerman. There
16 may be folks who say give me the reformed kosher food. There
17 may be folks who say give me the middle ground, give me that.
18 And so it's very troubling to think that without further
19 hearings or investigation or evidence on this we would have a
20 one size fits all for the class. So my recommendation is if
21 the Court --

22 **THE COURT:** So you're saying that even the individual
23 inmates that are receiving kosher meals now there are some that
24 don't necessarily require the rabbinic supervision because
25 they're not Orthodox; for example, if they're reform or

1 something else. Is that what you're telling me?

2 **MR. GEDDES:** I think that bears investigation. I
3 don't know. I do know this, that who we have today, we have
4 inmate Ackerman who professes in his complaint to be an
5 Orthodox Jew. I think what this Court has heard for the last
6 couple of hours now is what do Orthodox Jews require. There's
7 been a dispute about it. But Messianic Jews or, you know,
8 certain Methodists, I mean it is not a one size fits all. And
9 to the degree that others who require a kosher meal do not
10 insist upon such scrutiny they wouldn't necessarily even fall
11 in the class, the Messianic class.

12 But if you're going to fashion a remedy and this
13 Court wants to restrict it to the least restricted scope to
14 correct any perceived violation, there has to be further
15 inquiry. And so, of course, without even talking to my client
16 it stands to reason and common sense, do I think my client
17 would rather have an injunction against it limited to one
18 person versus an entire class? Absolutely. I don't have the
19 authority to say that, but my hunch tells me my client's going
20 to say if the Court says I have a choice between giving it
21 to Ackerman and giving it to others, give it to Ackerman. That
22 stands to reason. But I don't think for the reason which you
23 just said that you could assume that everyone who requires a
24 kosher meal requires the same level of scrutiny that the
25 Orthodox claims of Ackerman would require.

1 **MR. HAFTER:** Your Honor, I'm sorry. They don't
2 provide different levels of kosher meals now. You either get
3 the kosher meal or you don't get the kosher meal. And, in
4 fact, the matter is reformed -- there is no place for kosher
5 meals in the reformed movement. That's my point your Honor,
6 okay. That's why we can't go by a reformed rabbi. And for him
7 to say, well, I don't know what they --

8 **THE COURT:** Well, but I don't want to include people
9 in a class that don't want to be included. I mean, frankly, we
10 already have Mr. Ackerman here as the Plaintiff. There is a
11 motion for a class certification, which we do need to look
12 into, and I think that that's --

13 **MR. HAFTER:** And it's easy --

14 **THE COURT:** -- something that we probably will -- I'm
15 not going to rule on that today. I am going to issue the
16 preliminary injunction as to Mr. Ackerman. I want to set a
17 hearing for prior to the 21st though.

18 So do you all have your calendars with you?

19 **MR. HAFTER:** Your Honor, first of all I've got to say
20 this. For him to suggest, oh I don't know if there are other
21 people that have different needs, they take the kosher food
22 menu. They've asked for the kosher food menu because they know
23 what it is and it's what they require.

24 I've already presented case law here from California
25 that suggested that under the same federal law Messianic Jews

1 are entitled to it. The point is, is if you're getting kosher
2 food you should be able to retain that right. And all you're
3 asking -- all that's going to happen is, is you're going to
4 create a substantial amount of work for my office --

5 **THE COURT:** Well, I'm not saying that they're not --
6 that the other individuals aren't going to be able to obtain
7 the kosher food that's offered by the new menu. I'm just
8 saying that Mr. Ackerman is the only one whose meals would be
9 enjoined and he would not be --

10 **MR. HAFTER:** The problem is now --

11 **THE COURT:** -- provided the new kosher menu.

12 **MR. HAFTER:** -- they've got aggrieved -- all these
13 other people have to grieve it, and then they're going to take
14 their time in hearing the grievances, and then we're going to
15 have file new lawsuits.

16 **THE COURT:** No, because until then I want to set a
17 hearing before the implementation on the 21st so that we can
18 look at how many other individuals would be in this class and
19 whether or not these are individuals who would require the --

20 **MR. GEDDES:** Can we have that be an evidentiary
21 hearing --

22 **THE COURT:** -- more Orthodox --

23 **MR. GEDDES:** Just making arguments doesn't inform the
24 Court as much as hearing evidence.

25 **THE COURT:** Possibly that would be the better way to

1 go.

2 Melissa, do you have something before the 21st?

3 **THE CLERK:** I got the 14th.

4 **(Court confers with the Clerk)**

5 **THE COURT:** How about Wednesday, February 15th, if
6 we --

7 **MR. HAFTER:** I'm in San Francisco arguing before the
8 Ninth Circuit, your Honor.

9 **THE COURT:** Oh, okay.

10 **MR. HAFTER:** On Wednesday and Thursday.

11 **THE COURT:** Wednesday and Thursday.

12 **MR. HAFTER:** The following week I'm in New York and
13 New Orleans. And quite honestly, your Honor, I'm trying to
14 understand what specifically -- what evidence would you be
15 looking to hear. I mean do I need to go grab experts to
16 testify as to kosher food standards? I mean right now there's
17 a kosher food policy that the prison has.

18 **THE COURT:** My question is whether or not I can grant
19 a preliminary injunction to anyone other than Ackerman
20 when Ackerman is the only Plaintiff in the case. We haven't
21 certified a class in the case, so how can I grant a preliminary
22 injunction to a class of individuals that hasn't even been
23 identified and certified as a class?

24 **MR. HAFTER:** They've only made two objections to the
25 motion to certify. One is because Ackerman received the

1 canteen items and one is because of this mysterious enemy
2 combative. All right. And as long as he's at Lovelock, which
3 they said that they have a right to keep him separate and move
4 him so that's -- there is no conflict there, all right. And
5 presumably, the only thing Ackerman is asking for is to
6 maintain the status quo of the availability of kosher food for
7 all the inmates that are receiving kosher. Who would have a
8 problem with that?

9 **MR. GEDDES:** We do, your Honor, and I'll tell you
10 why. We've heard testimony all morning about, well, they don't
11 count because they're of this tribe or of this level or they're
12 reformed --

13 **MR. HAFTER:** No, we never said that, your Honor.

14 **MR. GEDDES:** You did. You said that this person's
15 opinion doesn't count, this person is reformed.

16 **MR. HAFTER:** As an expert.

17 **MR. GEDDES:** That implies that there are different
18 needs. And I think this Court under the PLRA has to restrict
19 its scope of relief on an informed basis to the needs that are
20 presented. And I think that warrants having an evidentiary
21 hearing to hear whether or not Messianics or are there reformed
22 rabbis, are there -- we don't know that. And all we're hearing
23 today is argument and all we're asking for is an evidentiary
24 hearing where the Court can gather evidence.

25 **MR. HAFTER:** Your Honor, what he's asking to do is

1 bring every rabbi in here and argue about the standards of
2 kosher food.

3 **MR. GEDDES:** No, I'm --

4 **MR. HAFTER:** That's not the issue. The issue is, is
5 whether or not somebody who is getting kosher food now is
6 entitled to continue to receive that under an equal rights and
7 First Amendment issue. The fact of the matter is if they're
8 not happy with the current kosher menu because it doesn't meet
9 their needs, they would have brought an action just like we're
10 bringing to challenge the common fare menu against the current
11 kosher menu. That's not the issue here.

12 **MR. GEDDES:** The issue, as has been stated many
13 times --

14 **THE COURT:** Okay. There's two different motions.
15 The one motion is the motion for preliminary injunction that
16 Mr. Ackerman has raised, and I am granting that. The other
17 motion is the motion for class certification, and that motion
18 we are not going to be making a ruling on today. I think I do
19 want more information as to that. So I want to set a hearing
20 for the motion for class certification so that we can have --

21 **MR. HAFTER:** So the issue is only class
22 certification, right, your Honor?

23 **THE COURT:** Right.

24 **MR. GEDDES:** Well, your Honor --

25 **MR. HAFTER:** And what are you specifically asking us

1 to present at that hearing so we could prepare for that
2 properly?

3 **THE COURT:** Well, for example, you've already briefed
4 for me today that if there was a class certified, that the
5 individuals who would be able to be identified as appropriate
6 members of those class would not have to go through the
7 grievance procedure themselves. So, you know, for example,
8 that would be something that --

9 **MR. HAFTER:** That's not an evidentiary hearing;
10 that's a legal argument.

11 **THE COURT:** No, right. And because I think there is
12 still a --

13 **MR. GEDDES:** The scope of relief needs to be
14 determined, your Honor, and you need to base that on evidence.
15 We are told that the reason why the CFM doesn't work -- we were
16 told that today -- is because there's no ongoing supervision by
17 a rabbinical authority. There's been no evidence that anyone
18 who would like the kosher meal requires that. There are the
19 Messianics, there are others, that's what we're saying. And so
20 in order to scope -- to provide the scope of relief to its
21 appropriate measure, the Court has to receive evidence as is --
22 what we're hearing, it's kosher, it's kosher; that's not true.
23 The reason why this Court is ruling that this is not kosher is
24 for two very specific reasons. Ongoing supervision --

25 **THE COURT:** Well, there are some people who have

1 moved to intervene. And I don't know how many other people
2 would want to be -- how many other inmates would want to be
3 included in this preliminary injunction. Maybe they don't.
4 Maybe they'd like the new menu. Maybe they think it's going to
5 be better than the one they have now. I don't know if
6 everybody is as concerned as Mr. Ackerman about whether or
7 not --

8 **MR. GEDDES:** That's our point.

9 **THE COURT:** -- there is the rabbinic supervision --

10 **MR. HAFTER:** But we don't have access to --

11 **MR. GEDDES:** Whether there's the need.

12 **MR. HAFTER:** -- the inmates, your Honor. I mean I
13 can't -- we can't -- I don't even know who the enemy is that I
14 can -- we can't ask him. We could bring him in and say: Would
15 you have a problem with us fighting this based on the briefs
16 and the pleadings that we've put in -- would you have a problem
17 with us fighting on your behalf as a member of the class? But
18 I can't even do that. I can't even present that evidence
19 because I don't know who it is.

20 **THE COURT:** Well, does the Department keep statistics
21 about -- I'm sure they have to --

22 **MR. SPEAKER:** Absolutely. We know who's having a
23 kosher meal.

24 **THE COURT:** -- of who is certified and who is not,
25 who is having a kosher meal and who is not --

1 **MS. ROSENBERG:** We can't do that for --

2 **THE COURT:** -- and based on what information? Can't
3 do what, can't keep the information?

4 **MS. ROSENBERG:** We don't know who's a -- who
5 specifically -- we can't ask those questions.

6 **THE COURT:** Okay.

7 **MR. SPEAKER:** But your Honor --

8 **THE COURT:** But you know who is --

9 **MR. SPEAKER:** Well, no, it's --

10 **THE COURT:** -- and who's not receiving the kosher
11 meal.

12 **MR. SPEAKER:** Right. We --

13 **MS. ROSENBERG:** Oh, we do, absolutely. Absolutely.

14 **MR. SPEAKER:** That's what we're saying.

15 **MR. HAFTER:** And I think that they could easily
16 provide those people with a questionnaire saying do you want to
17 be members of the class? And I think it would be fair if
18 they -- if they answer in the affirmative on a questionnaire,
19 they should be entitled to the preliminary injunction as well.

20 **MR. GEDDES:** Your Honor, the reason why this goes
21 back to the scope is there's more than one kosher. And I think
22 the Court's concern --

23 **MR. HAFTER:** There's not. There's one kosher meal in
24 the prisons. That's it.

25 **MR. GEDDES:** We have testimony already on the record

1 from a person who they call a reformer. He is a rabbi in
2 California. We are entitled to know whether the scope of
3 relief for Mr. Ackerman's needs is the same for all. Now, he's
4 saying kosher is kosher. That's not true. The reason why this
5 Court is looking at serious needs is on the two issues he's
6 identified on the record before this Court, continuous
7 supervision and certification.

8 We know that there are reformed rabbis. There are
9 different diets; there are different needs. And it's not
10 appropriate under the PLRA to say one size fits all at
11 \$1.5 million potential extra costs to the state of Nevada.
12 That's just not right and we don't have the evidence.

13 **MR. HAFTER:** First of all, we don't know if
14 1.5 million --

15 **THE COURT:** Do you have a position -- Mr. Geddes, do
16 you have a position as to whether this would be an opt in or an
17 opt out class?

18 **MR. GEDDES:** I don't. I would have to brief it, your
19 Honor.

20 **MR. HAFTER:** Your Honor, we don't know that 1.5 is
21 correct.

22 **MR. GEDDES:** I have evidence before the Court; it's
23 projected. If you have evidence --

24 **MR. HAFTER:** No, you have preclusionary statements.
25 And we haven't had a chance to investigate --

1 **THE COURT:** I don't have a doubt there's a cost
2 statement. And it really doesn't matter --

3 **MR. HAFTER:** There is a cost statement but --

4 **THE COURT:** -- if it's 1.2 or 1.5. But that's okay;
5 we're not going to go there.

6 **MR. HAFTER:** But many courts have said that the cost
7 statement isn't enough. And the fact of the matter is we're
8 not talking implementing a new program. We're talking about
9 with the preliminary injunction maintaining the status quo.
10 The status quo is the one kosher menu that they're currently
11 using, they've been using for the last God knows how many
12 years. And I think, if anything, the only thing that would be
13 appropriate for this Court to query is the people who are
14 currently receiving the kosher meal, do they want to continue
15 to receive it under their religious beliefs. And if they
16 answer yes under oath to that question, then they should be
17 included in this.

18 **MR. GEDDES:** Your Honor, we're hearing a lot of
19 avoidance --

20 **THE COURT:** Okay, well.

21 **MR. GEDDES:** -- to evidence. All we're asking for is
22 evidence.

23 **THE COURT:** Okay. Today is the 9th or the 10th?
24 What is today's date?

25 **MR. HAFTER:** The tenth, your Honor.

1 **THE COURT:** The tenth. Okay. Today is the 10th, and
2 the implementation is scheduled for the 21st. So here's what
3 I'm going to do. I'm going to go ahead and grant the
4 preliminary injunction as to Mr. Ackerman. And then as to the
5 rest of the individuals who are receiving a kosher meal I am
6 asking Mr. Geddes -- or Mr. Geddes to plead provide to them a
7 letter indicating that the Court is providing them a choice as
8 to whether or not they want to be included in the preliminary
9 injunction. And then they can indicate whether or not they
10 want to. Some people may not want to. Some people may want
11 to. I don't feel comfortable making that decision for them.

12 **MR. GEDDES:** Your Honor --

13 **THE COURT:** And if we can have that before, I guess
14 February 20th, since the implementation is on the 21st. And
15 you can just file it. And you know, you can make it so that if
16 they don't respond by a certain date, then they don't get to
17 opt in. And then that will just be for the purpose of the
18 preliminary injunction now.

19 For purpose of class certification, that's still
20 alive and still can be addressed on a different day. This is
21 just for the immediate injunction.

22 **MR. HAFTER:** And so from my understanding, what
23 you're insinuating is that we won't have to come back. We'll
24 just simply include those members who opted in the affirmative.

25 **THE COURT:** Right. He'll just file with me an

1 indication of which individuals have said yes we want to be
2 included, and then those names will also be added to the order.
3 I'm trying to make it as simple as I can for you all.

4 **MR. GEDDES:** Can I make sure I understand what the
5 Court is saying?

6 **THE COURT:** Sure.

7 **MR. GEDDES:** The Court is saying you want us to give
8 notice to the current members who are receiving kosher meals
9 saying would you like to opt --

10 **THE COURT:** You can give it to them at their very
11 next meal. By the way, here's an order from the Court that
12 says there's been an injunction. There's a new meal -- you all
13 know there's a new meal, because you all know there's a new
14 meal coming. Then the Court is ordering an injunction as to
15 the one person who raised this issue. If you also want to be
16 included in that injunction and not receive the new meals --

17 **MR. GEDDES:** Your Honor, we object to that. We are
18 becoming an advocate for the Plaintiff. If Plaintiff wants to
19 survey who his class is, it shouldn't be incumbent on the
20 Defendant, an adversarial party, to invite members to his
21 lawsuit.

22 And the other question is, is there not going to be
23 any evidence here?

24 **THE COURT:** Well, that's what happens when you raise
25 a class action. Do you want him to draft the letter?

1 **MR. GEDDES:** It's these are his clients. He's asking
2 me to create more liability from our client.

3 **THE COURT:** Okay. How about if I draft the letter
4 and then I will file it and then you can give it to the inmates
5 with their next kosher meal, and they can indicate on that form
6 whether or not they want to be included in the injunction. If
7 they do, I'll add their name to the order; and if not, then I
8 won't.

9 **MR. GEDDES:** And then what happens to the upwards of
10 500 and something inmates who are projected to join along the
11 way? This is really going to be exactly what we talked about
12 and these are going to be --

13 **MR. HAFTER:** Your Honor, that's speculation.

14 **MR. GEDDES:** Excuse me, I'm not finished. This is
15 going to be the parade or horrors that we've demonstrated
16 through evidence, and we have no expert testimony, no one
17 qualified in the rabbinic field to distinguish between the
18 degrees of kosher and whether this is something that --

19 **THE COURT:** Are you telling me that the common fare
20 menu is so horrible that every other inmate is going to decide
21 to become an Orthodox Jew in order to be able to retain the old
22 menu?

23 **MR. GEDDES:** I can comfortably say to this Court
24 that -- and I've said it before already -- the one thing the
25 prisoners want is what someone else doesn't have.

1 **THE COURT:** Because I'll tell you. With all due
2 respect, I like bacon, I like cheese on my cheeseburger. If
3 I'm an inmate, I'm not necessarily going to go kosher just
4 because of this.

5 **MR. GEDDES:** Your Honor, the inmates obviously are
6 going to have a perception that this costs a lot more money and
7 they're going to want that. I believe that in fairness and
8 under the PLRA we have to have a hearing on the needs of
9 various religious organizations that require different degrees
10 of kosher. I do not believe that Mr. Hafter will stand up
11 before this Court and say that a liberal or reformed Jewish
12 person has the exact same religious requirements. I spoke with
13 a rabbi --

14 **MR. HAFTER:** But it doesn't it --

15 **MR. GEDDES:** -- who was reformed. I'm almost
16 through. I spoke with a rabbi, and she has a much different
17 diet than an Orthodox. And so the current kosher meal is one
18 that is a restrictive and costly kosher meal. The common fare
19 menu satisfies that. And we have to receive evidence as to
20 whether Messianics or others require the element of ongoing
21 continuous supervision through a rabbinical authority. That is
22 the sole basis of the Court granting the injunction.

23 **THE COURT:** Okay. Well, if you have to have that
24 evidence, then why don't you put off the implementation until
25 we have that evidence. But you don't want to do that.

1 **MR. GEDDES:** I can contact my client to see if it
2 will delay it a week or two. We would like to schedule an
3 expert hearing on this. I really believe we're being --

4 **THE COURT:** I will schedule an expert hearing if you
5 would delay the implementation order for us to be able to have
6 that evidentiary hearing.

7 **MR. GEDDES:** How much time do we need to delay it? I
8 will present this to my client.

9 **MR. HAFTER:** Your Honor, in order for us to present
10 an expert we need to have unfettered access to inspect their
11 facilities.

12 **THE COURT:** I think you all are going to have to
13 conduct some actual --

14 **MR. HAFTER:** We need discovery.

15 **THE COURT:** -- discovery.

16 **MR. HAFTER:** Absolutely. We can't just rush into --
17 and so I think what the difference is, this parade of horrors
18 that he's saying is going to happen, forgets the fact that you
19 said it's limited to the people who are currently receiving a
20 kosher meal. We're fine with that.

21 **MR. GEDDES:** Just one second.

22 **(Voices heard off the record)**

23 **MS. ROSENBERG:** Two hundred and ninety-three.

24 **MR. GEDDES:** Two hundred and ninety-three inmates,
25 your Honor. And I can guarantee you, because I'm working on

1 some of those cases, they are not all Orthodox Jews. We are
2 simply providing an overbroad relief, which violates the Prison
3 Litigation Reform Act. I'm sorry opposing counsel is not
4 available next week. This is an important case for the state
5 of Nevada.

6 We will accommodate the Court if the Court would like
7 to push us back a few weeks. I can represent that to my
8 client; I can recommend, I'm sorry. I would like to get some
9 experts. I would like this Court to have an informed opinion
10 as to what the needs, how they vary from the kosher. It is not
11 fair to take opposing counsel's specialized knowledge, which is
12 not factual knowledge; it's specialized knowledge. And there
13 needs to be sworn witnesses who can be cross examined and the
14 Court can attach the correct weight of authority to that
15 opinion. That's not what's happened here. We have someone who
16 outmatches me on ecclesiastical issues, and it's simply not
17 fair.

18 **MR. HAFTER:** Your Honor, they've said that the
19 standard that they're trying to implement is the Orthodox
20 Union. Bring in a representative of the Orthodox Union --

21 **MR. GEDDES:** We'll bring them --

22 **MR. HAFTER:** -- and it will satisfy it. We'll gladly
23 provide a representative from the Orthodox Union to --

24 **THE COURT:** Okay, time out.

25 **MR. HAFTER:** -- address supervision.

1 **THE COURT:** Time out, time out. Okay. We're done.
2 I am issuing the preliminary injunction as to Mr. Ackerman. I
3 will formulate an order or a letter that will be filed that
4 then Mr. Geddes can go ahead and provide to the prison, to go
5 ahead and provide to all the inmates that receive -- the two
6 hundred and some inmates that receive their kosher meal. And
7 they can decide whether or not they want to opt in for the
8 purposes of preliminary injunction. This has nothing to do
9 with the class, just preliminary injunction. And then we'll
10 come back here and have a hearing. And it's up to you if your
11 client wants to go ahead and rather than go through all the
12 trouble if they want to just hold off on implementing the plan.

13 **MR. GEDDES:** That's what I need clarification if I
14 may from the Court, a couple of things.

15 **THE COURT:** That would be the alternative that I
16 think would be very reasonable if you want to put it off.

17 **MR. GEDDES:** In lieu of granting the injunction is
18 the Court offering an alternate relief that will suspend that
19 ruling --

20 **THE COURT:** Yes.

21 **MR. GEDDES:** -- in light of a stay of advancement for
22 a reasonable amount of time so we can put on an evidentiary
23 hearing?

24 **THE COURT:** So we can have a hearing, yes.

25 **MR. GEDDES:** Okay.

1 **THE COURT:** But I want to have actual discovery
2 before we can have the hearing. So we're talking at least 60,
3 90 days.

4 **MR. HAFTER:** What's the problem with having an
5 injunction in place if they're delaying the implementation?
6 They can always move to lift the injunction once we have done
7 that --

8 **MR. GEDDES:** The other question I had, your Honor, is
9 would this Court certify this for an interlocutory appeal?

10 **THE COURT:** I think I would once I issue an order,
11 but I don't think we've gotten to the point where I've issued
12 an order yet that I think is --

13 **MR. GEDDES:** And so --

14 **THE COURT:** -- sufficient for the -- the point of the
15 appealability is I have to provide an order and the information
16 sufficiently so they can actually review it. So there needs to
17 be something for them to be able to review it. At this point
18 we're still kind of up in the air as to whether or not you're
19 going to be delaying the implementation or whether --

20 **MR. GEDDES:** And you can set a deadline for us to
21 notify the Court. We're happy to do that. We would like that
22 clarification.

23 **THE COURT:** That would probably be the best way.

24 **MR. HAFTER:** So let me ask you something, your Honor.
25 If they say we're going to delay it for 60 days, are we going

1 to be back here doing this again in 60 days?

2 **MR. GEDDES:** Hopefully, we'll have an evidentiary
3 hearing.

4 **THE COURT:** Well, what I would prefer is for you all
5 to get a discovery scheduling order in place and have an
6 evidentiary --

7 **MR. HAFTER:** Which the motion to dismiss isn't
8 granted --

9 **THE COURT:** Discovery for -- no, we have a lot of
10 cases where we don't rule on the motion to dismiss right away
11 and discovery begins, because often times it's helpful to
12 supplement the motions after you do some discovery.

13 So, I'm sorry, Melissa. I think that you started
14 giving me dates and then -- so go out 60 days. Let's see if we
15 can -- so some time in April.

16 **MR. GEDDES:** And, your Honor, may we -- so that I can
17 take back to my client clarification from the Court, obviously
18 my client is going to have to evaluate a cost benefit analysis
19 to see what is in its best interest and the interest of the
20 state.

21 Is it this Court's order, can it be this Court's
22 order, we would request that the only people that if this
23 Court -- if the option that's selected is a limited injunction
24 rather than a stay of time to implement the common fare without
25 the pronouncement from this Court, which we believe will be a

1 formal statement that there is an injunction, that only those
2 members who as of today are receiving current menus are
3 eligible for the Court's order, that there cannot be this
4 bandwagon effect where new people are going, "Hey, did you hear
5 what happened? Let's sign up, let's sign up."

6 There are -- how many did you say?

7 **MS. ROSENBERG:** Two ninety-three.

8 **MR. GEDDES:** Two hundred and ninety-three. The
9 projection for 2013 goes up over 500. I think that if we --

10 **THE COURT:** Well, I don't think we can limit it under
11 the spirit of (indiscernible) because if anyone does convert,
12 or if anyone new is admitted into prison who wants to also
13 participate, I can't see how they wouldn't be included under my
14 lupa, under my reading.

15 **MR. HAFTER:** Conversely, your Honor, I'd be fine with
16 stipulating to limit it to not just those who are currently
17 receiving it, but anyone who has an application in today to
18 receive it because I think that's a fair breaking point.

19 **MR. GEDDES:** This relief is over-broad. Not
20 everyone, including the Messionics, are going to insist upon or
21 require -- and they may insist upon it because they perceive
22 there's more value in it but there could be evidence to show
23 it's not required. And we haven't even had evidence before
24 this Court to show that the Orthodox standard or Mr. Ackerman's
25 standard is required. All we have is we have talk and

1 argument, and this is the reason why I filed my motion saying,
2 is evidence going to be received, are we going to have experts
3 because we have a lot to say on this. And under PRLA, the
4 relief is extremely over-broad.

5 **THE COURT:** Well, I don't think it's over-broad when
6 the original request was to enjoin the entire implementation as
7 to everyone, and so I'm down to the point where I'm only
8 enjoining it as to Mr. Ackerman, and then only providing
9 letters to the individuals who are currently receiving the
10 kosher meals, so I'm trying to limit it as much as possible. I
11 don't think it's over-broad.

12 **MR. GEDDES:** Can we request further hearing then
13 before this Court then expands it to other people?

14 **THE COURT:** You can always file a Motion to Modify a
15 Preliminary Injunction.

16 **MR. GEDDES:** Well, I'm requesting an Evidentiary
17 Hearing is what I would do.

18 **THE COURT:** And that's what I'm trying to see. If we
19 can't get a date, we can do that.

20 **MR. GEDDES:** I'm not asking for an Evidentiary
21 Hearing at the end of Discovery because that's basically a
22 trial. I'm asking for an Evidentiary to prevent undue hardship
23 on the State of Nevada.

24 **MR. HAFTER:** Your Honor, that goes to the ultimate
25 merits of the case. I mean. there are --

1 **MR. GEDDES:** It goes to the scope of relief, under
2 the PLRA which you haven't even addressed in your briefs.

3 **THE COURT:** Okay, enough, please? Both of you sit
4 down and just be quiet for a second so I can look at the
5 calendar.

6 **MR. GEDDES:** Thank you, your Honor.

7 **(Pause)**

8 **THE COURT:** How about April 4th? That's a Wednesday.

9 **MR. HAFTER:** Your Honor, what testimony are we
10 providing, because if you're going to ask me --

11 **THE COURT:** This would just be a motion on a hearing
12 for the certification of class.

13 **MR. HAFTER:** Okay, because if you're going to ask me
14 to provide any Rabbinic source, I can tell you there's no way
15 because that's a day and a half before Passover --

16 **THE COURT:** Oh.

17 **MR. HAFTER:** And so there's no way I'm going to be
18 able to get any Rabbinic experts here to testify, but I don't
19 think a Rabbinic expert is necessary for certification in
20 class, is it?

21 **MR. GEDDES:** Your Honor, it absolutely is.

22 **THE COURT:** It depends on the argument which I now
23 think is going to be, or has turned into whether not the class
24 includes only the Orthodox, or whether it includes all other
25 Jewish inmates. If I'm hearing Mr. Geddes right, that seems to

1 be, perhaps, the --

2 **MR. HAFTER:** Your Honor, I don't even know how to --
3 I don't even know how to address that. You've got a population
4 of people who are obtaining kosher food now. I mean, they've
5 met whatever burdens there are.

6 **THE COURT:** I don't think it's a factual question; I
7 think it's a legal question, and if you look at -- into Class
8 Certification you might be able to determine whether or not the
9 -- the certification of the class, whether that's something --

10 **MR. HAFTER:** I agree, and that's why I'm just --

11 **THE COURT:** -- the parameters of which you could give
12 the Court some clarification as to how much leeway and
13 discretion I have.

14 **MR. GEDDES:** Thank you, your Honor. May we add
15 briefing to that Certification Class. We would welcome that
16 opportunity.

17 **THE COURT:** Yes. In fact, I think that was one of
18 the motions that actually was completely briefed, so I think we
19 should probably have --

20 **MR. GEDDES:** We request further briefing based on the
21 developments in this hearing, your Honor.

22 **THE COURT:** Yeah, I think that's a good idea because
23 this is something new that's come up that wasn't already
24 briefed and --

25 **MR. HAFTER:** We would ask that they take the first

1 shot at a brief because I'm not really sure. Besides the
2 exhaustion issue on PRLA first, for new class members, and the
3 issue of opt in, opt out, I'm not sure what else is the issue
4 so --

5 **THE COURT:** Okay, so Passover is April 6th to April
6 14th?

7 **MR. HAFTER:** It starts that Friday, yeah.

8 **THE COURT:** Okay. So how about the 18th, April 18th?
9 Is that a Wednesday, too?

10 **THE CLERK:** Yes, your Honor.

11 **THE COURT:** Okay, Wednesday, April 18th?

12 **MR. HAFTER:** Okay.

13 **THE COURT:** How does that sound?

14 **MR. GEDDES:** Your Honor, if it means we go first, we
15 get the reply brief, we're happy to do that. And just so that
16 you know, your Honor, this is a hearing where we can present
17 experts, is that correct?

18 **THE COURT:** Yes, I'm -- I'm blocking off the entire
19 day.

20 **MR. HAFTER:** Well, that's my question, your Honor.

21 **THE COURT:** Well, that's the --

22 **MR. HAFTER:** Is it a legal issue?'

23 **THE COURT:** It's the Plaintiff's Motion for Class
24 Certification, so I think that the Plaintiff should go first,
25 and also get the Reply.

1 **MR. HAFTER:** What issues would you like us to brief
2 here?

3 **THE COURT:** If I were, of course, whether or not I
4 should certify the class based on the new information that we
5 know now, and if I was to certify the class, who would be
6 included in that class? Who would receive the notification?
7 And then whether it would be an opt in or an opt out. That's
8 just off the top of my head. I'm not saying that that's all --
9 you-all have a way of bringing issues in that no one ever
10 considered, so I'm --

11 **MR. HAFTER:** Isn't that what was already in our
12 Motion?

13 **MR. GEDDES:** Your Honor, could we also brief the
14 issue as to whether or not the relief of the -- any injunctive
15 relief of a common -- of the kosher meal is required for
16 certain members who may have a lesser standard, and that's what
17 we want expert testimony on.

18 **THE COURT:** Well, that would be part of whether --

19 **MR. GEDDES:** Thank you.

20 **THE COURT:** -- the definition of the class, wouldn't
21 it?

22 **MR. GEDDES:** Thank you.

23 **THE COURT:** I'm assuming. Now it's very clear. You
24 will be arguing only the Orthodox Jewish inmates should be
25 included.

1 **MR. GEDDES:** Well, in order to --

2 **THE COURT:** Well, but in the alternative, if there
3 were to be one, but it would be only as to those people.

4 **MR. GEDDES:** In order for that we need Discovery,
5 your Honor, and we need to know every prisoner who is currently
6 receiving kosher food. We need all their applications that
7 they made to obtain that because there is an application
8 process. We need to be able to have unfettered access to those
9 individuals. I should be able to have arrangements and that
10 way any and all of them, all 293 can testify on April 18th?

11 **THE COURT:** Judge Leen will be able to take care of
12 all of those requests. Those are all discovery issues --

13 **MR. GEDDES:** Is this going to be heard before Judge
14 Leen?

15 **THE COURT:** I'm sorry?

16 **MR. GEDDES:** Is this going to be heard before Judge
17 Leen.

18 **THE COURT:** I believe -- yes. It a PAL case, right?
19 Is it GMN-PAL?

20 **MR. GEDDES:** Yes.

21 **THE COURT:** Yeah, so that's Judge Leen.

22 **MR. HAFTER:** But, your Honor, my problem is if I've
23 got 60 days to put all this together, and we start arguing over
24 formal discovery requests, and when discovery started --

25 **MR. GEDDES:** It's litigation.

1 **THE COURT:** Well, I'm still --

2 **MR. HAFTER:** That's right, it's litigation.

3 **THE COURT:** I'm still -- just a minute. I'm still
4 granting the motion for the preliminary injunction as to
5 Mr. Ackerman, and I'm still drafting the letter, and it's going
6 to be provided to everyone receiving a kosher meal, and they
7 can decide whether or not to be part of the Order. That's
8 still in effect unless the Department decides that it's in
9 their best interests to just defer the implementation
10 altogether. That will be their administrative choice to make.

11 But -- so that's -- so essentially, anyone who wants
12 to be included will be included. At least that's my intent
13 with my Order. I might be missing something but that's my
14 intent.

15 **MR. GEDDES:** Of the current --

16 **MR. HAFTER:** And then, in essence, all I have to --
17 all we are required --

18 **THE COURT:** But that doesn't mean that part of the --
19 of the class, or the class action certification, which brings
20 up other issues.

21 **MR. GEDDES:** Your Honor, is the Court limiting it or
22 not limiting it? Is it anyone who wants to join on the
23 bandwagon can join on the bandwagon?

24 **THE COURT:** No. This letter is only being provided
25 to the individuals that are currently receiving the kosher

1 meals. That's what Mr. Hafter just said he would be willing to
2 go ahead and allow that limitations so that you don't --

3 **MR. GEDDES:** Is it Orthodox Jews, or is it anyone --
4 Messionics --

5 **THE COURT:** Anyone currently receiving the kosher
6 menu.

7 **MR. GEDDES:** Okay.

8 And so the Evidentiary Hearing on this is April 18th,
9 is that the date that's been picked?

10 **THE COURT:** April 18th, 9:00 a.m. -- Melissa?

11 **THE CLERK:** Yes.

12 **THE COURT:** 9:00 a.m., April 18th.

13 You all can, of course, agree to stipulate to change
14 that date if -- if there's some resolution, or if there's some
15 further discovery that you want to do, but you can take that up
16 with Judge Leen, I'm sure she'll --

17 **MR. GEDDES:** Okay, so if we send the letters out, and
18 February 21st comes by, we just -- we crank out the CFM with
19 the exception of those who are on the letter.

20 **THE COURT:** Correct.

21 **MR. GEDDES:** So that during the 60-day period we'll
22 have two lines of operation with respect to kosher meals, those
23 who --

24 **THE COURT:** My Order today will be as to Mr. Ackerman
25 only with the caveat that the letter is to be provided to the

1 other individuals receiving the kosher meal.

2 If anyone decides that they want to be included, then
3 I'll just amend my Order to add their name.

4 **MR. GEDDES:** And where are they sending the
5 information if they want it? Do they send it back to the
6 Court?

7 **THE COURT:** No, you're sending it. You're going to
8 be filing it.

9 **MR. GEDDES:** Okay. And so -- but until the Court
10 pronounces, it could be this process where its gathered and
11 sent back to the Court, but the Court will pronounce -- take
12 them off the common fare and give them the current kosher menu.
13 It's not something we have to be ambivalent or guess about, is
14 that correct?

15 **THE COURT:** Right. You're going to be filing, before
16 February 20th, with the Court the list of individuals who
17 received that letter and decided that they wanted to be
18 included in the injunction.

19 **MR. GEDDES:** Your Honor, could we --

20 **THE COURT:** And then I'll issue the menu order and
21 just add those names to the list --

22 **MR. HAFTER:** Okay. So it's not something ongoing
23 past the 20th?

24 **THE COURT:** So right now the Order is only going to
25 have one name, Mr. Ackerman. You're -- I'm going to draft the

1 letter. You're going to provide it with the meals to everyone
2 that provides the kosher meals. They're going to either opt in
3 or throw it away or do whatever --

4 **MR. GEDDES:** So they have till February 20th and then
5 that's it?

6 **THE COURT:** Well, you decide what date,
7 administratively, you need to have that back. You need to file
8 it. Your requirement is to file it with the Court before the
9 20th so that I can file the Amended Order before the 21st.

10 **MR. GEDDES:** So if we file it on the 19th and gather
11 up all the names we've gotten back --

12 **MR. HAFTER:** Your Honor, the 19th --

13 **THE COURT:** Maybe you give these people one day, you
14 can give them two weeks -- I don't know how long you're going
15 to give them to get back to you. I mean, they can -- they can
16 decide to be --

17 **MR. HAFTER:** Your Honor, the 19th is a Sunday and the
18 20th is a legal holiday that this Court's closed on for
19 Washington's Day -- Washington's birthday.

20 But I would like to ask, as an aside, that your Order
21 also includes that --

22 **THE COURT:** But you filed something at 3:00 a.m. this
23 morning. You can electronically file everything.

24 **MR. HAFTER:** I would consider it for you, your Honor.

25 **THE COURT:** Well, I'm on line all the time. I

1 receive everything that's filed on that. Just like you get the
2 notifications of electronic filing (indiscernible), I get them,
3 too, on every single case that I have.

4 **MR. HAFTER:** I guess I was being presumptive that
5 you're not up at 3:00 a.m.

6 **THE COURT:** Well, I appreciate you calling that to my
7 attention. I did forget about the holiday.

8 **MR. HAFTER:** Your Honor, I would like to ask if the
9 Order also includes the requirement that we get a actual
10 photocopy of all responses that are provided, out of fairness.

11 **MR. GEDDES:** You'll get it when it's filed. We're
12 going to forward the documents to the Court and you'll get a
13 copy of that in an Efile.

14 **THE COURT:** Okay.

15 **MR. HAFTER:** Oh, so you're going to file the
16 actual --

17 **MR. GEDDES:** I will file them. I don't want to be
18 responsible for interpreting what they're saying.

19 **MR. HAFTER:** Well, that was my concern. I appreciate
20 that, Mr. Geddes.

21 **MR. GEDDES:** So, your Honor, we're not to --

22 **THE COURT:** If you could at least divide out which
23 ones said "yes" and which ones said "no" so it's easier for my
24 staff to count them up, and then you could go ahead and file
25 them just as two separate filings.

1 **MR. GEDDES:** And when do we get to weigh in on what
2 option we want?

3 **THE COURT:** You choose whatever option you want.
4 It's -- it's --

5 **MR. GEDDES:** Can you set a deadline for that so that
6 we --

7 **THE COURT:** Well, the implementation date is the
8 21st. You either implement it or you don't. If you do
9 implement it, you have to implement it with the conditions that
10 Mr. Ackerman and anybody else on that list on the Amended
11 Order, are not to receive it. But if you don't want to
12 implement it you don't have to.

13 **MR. GEDDES:** But once you issue an Order you'd would
14 be willing to certify that, if we wanted to have an
15 interlocutory appeal?

16 **THE COURT:** Yes.

17 **MR. GEDDES:** Okay, thank you.

18 **THE COURT:** Okay. So the next hearing is April 18th,
19 2012 at 9:00 a.m.

20 Any other clarification or anything else?

21 No? All right.

22 **MR. HAFTER:** No. Thank you, your Honor.

23 **MR. GEDDES:** Thank you, your Honor.

24 **THE COURT:** So I'll go ahead and get this done today
25 so that you have that and you can get started.

1 **THE CLERK:** All rise.

2 **THE COURT:** Thank you.

3 **MR. HAFTER:** Thank you.

4 **(This proceeding was adjourned at 1:16 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Toni Hudson", is positioned above a horizontal line.

Signed

March 15, 2012

Dated

TONI HUDSON, TRANSCRIBER